U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15Feb2002

CASE NO. 2001-AIR-2

IN THE MATTER OF:

GLYN TAYLOR, JR.

Complainant

V.

EXPRESS ONE INTERNATIONAL, INC.

Respondent

APPEARANCES:

JOHN CHELSEA ALLMAN, ESQ.

For the Complainant

DEREK BRAZIEL, ESQ.
JOHN F. MCCARTHY, JR., ESQ.

For the Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protective provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (herein AIR21), 49 U.S.C. § 42121, et seq., Public Law 106-181, Title V §§ 519 and the regulations thereunder at 29 C.F.R. Part 24.

On May 23, 2001, based on Complainant's filing alleging that Respondent discharged him in reprisal for raising aviation safety issues with management officials and the Federal Aviation Administration (herein FAA), the Regional Administrator for the Occupational Safety and Health Administration (herein OSHA)

determined that his complaint had no merit. (ALJX-1a). Complainant thereafter filed a request for formal hearing. (ALJX-2).

On May 23, 2001, this matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a formal hearing in Dallas, Texas, which commenced on December 10, 2001. (ALJX-3). The hearing adjourned until December 19, 2001, and was formally closed on December 21, 2001. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs. The parties argued the case orally. The following exhibits were received into evidence: Administrative Law Judge Exhibit Numbers 1-8; Complainant Exhibit Numbers 4, 6, 15, 18, 19, 20-29, 33-34, 40 and 42-43; and Respondent Exhibit Numbers 1-2, 7-10, 13-14, 21-24, 33, 37, 39, 44, 48, 51-54 and 60; and Joint Exhibit No. 1.

Post-hearing briefs were received from Complainant and Respondent on January 15, 2002.

Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. ISSUES

1. What standards of proof apply to cases under AIR21.

2. The timeliness of Complainant’s complaint.

3. Complainant’s alleged protected activity and whether such activity was a contributing factor in Respondent’s decision to discharge Complainant.

4. Whether Respondent established clear and convincing evidence that it would have discharged Complainant in the absence of his protected activity.

II. SUMMARY OF THE EVIDENCE

Glyn Taylor

Glyn Taylor (Complainant) began working at Eastern Airlines in 1968 at the age of 21 as a flight engineer, progressed to co-pilot,

and then Captain. He had 13,000 flying hours with Eastern Airlines during a 23-year period of employment. He was also an instructor-pilot. Thereafter, he worked as a Captain for various airlines, including airlines in Asia. (Tr. 140). He testified that he has 19,000 total flight hours. (Tr. 140-41). Complainant testified that he has never received any discipline from any company for which he has flown and no enforcement actions against him by the FAA. (Tr. 141).

Complainant began employment with Respondent on August 25, 1998. (Tr. 231). He was hired to fill the position of Captain, flying a Boeing 727 cargo aircraft. (Tr. 141). Complainant testified that in about March 2000, he began having concerns about air safety. (Tr. 142). On March 13, 2000, he wrote a letter to Mike Mills with the FAA. Mills is the operating inspector with principal oversight of Respondent's operations. Complainant lodged about a half-dozen incidents of safety. (Tr. 143). He stated this was the first time he had ever gone to the FAA to report safety concerns. He met with an attorney, Jeff Goldberg, concerning his fear of loss of employment or termination because he reported safety concerns to the FAA. (Tr. 145). After his March 13, 2000 letter, he was taken off flight status on March 14, 2000 by Respondent and directed to meet with Captain Spence, the Director of Flight Operations, and Mr. Schweitzer, who was the former chief pilot and the Director of Safety. (Tr. 147, 150). Complainant testified that they did not discuss all of the safety concerns he had expressed in his March 13, 2000 letter. The March 13, 2000 letter represented a synopsis or summary of five or six different reports which he had made prior to that date. (Tr. 153).

The first concern expressed by Complainant involved the conduct of Mr. Mailer and an overweight or redistribution problem loading an aircraft. He voiced concerns to Mr. Mailer and asked that the weight be redistributed in the aircraft. Complainant refused to fly the aircraft until such redistribution occurred. (Tr. 154-55). Captain Phillips wrote a letter to the subcontractor who employed Mr. Mailer and voiced concerns about Complainant's report. Complainant testified he never heard anything about the matter from the subcontractor. (Tr. 156; ALJX-1(d)).

The second incident about which Complainant expressed concern involved Tom Truby whom he thought was an employee of Respondent. This concern also involved an overweight problem of cargo not being properly distributed. (Tr. 156). Complainant verbally reported the concern to Captain Spence after which he was taken off flight status and told to report to a meeting in Dallas with Spence and Truby. Truby refused to attend the meeting which was not conducted. Captain Spence informed Complainant that Truby reported

during the incident Complainant remarked he was going to the FAA and Respondent was running an unsafe airline. Complainant denied ever making such statements to Truby. The meeting, which was scheduled for Monday, was called off on Saturday when Captain Phillips telephoned Complainant to inform that Truby was not going to participate in the meeting. (Tr. 156-59; ALJX-1(d)).

The third incident about which Complainant complained involved a check airman Geiselhart. Complainant verbally reported to Captain Spence that Geiselhart was "totally unprofessional and unsafe" during a series of flights while instructing a new flight engineer. He also complained about Geiselhart's future assignments with Complainant and requested that he be taken off any future assignments. Complainant testified he was taken off flight status and told to report to Dallas for a meeting concerning the events surrounding his complaint about Mr. Geiselhart. (Tr. 159; ALJX-1(d)).

The fourth incident about which Complainant complained was the loading of ULDs or unit loading devices shaped in the form of a can. ULDs were being loaded onto an aircraft with snow packed on top of the cans. Complainant complained about the snow being loaded into his plane, which he stated could melt and cause water to seep into the plane's electrical system and cause a safety concern. (Tr. 160; ALJX-1(d)).

The last incident about which Complainant expressed concern was the tail skid incident that occurred in March 2000, which was the most recent incident prior to the March 13, 2000 letter. (Tr. 162; ALJX-1(d)).

In the latter part of the Summer of 2000, Complainant noticed smoke detector problems in the aircraft which he was assigned to fly. He noted the smoke detector probes were broken, bent or missing in the cargo area. He testified it was his responsibility to ensure the integrity of the aircraft. (Tr. 168). There are approximately 12 to 14 probes in the fuselage of the aircraft for smoke detection during flight. There is no entry into the cargo area from the plane itself. Therefore, if a fire occurred, it would be an emergency which would require the pilot to land the aircraft immediately. The smoke detector probes were critical to flight safety according to Complainant. (Tr. 168-69). Complainant further testified the Federal Aviation Regulations (FARs) require that safety issues be reported and he entered the smoke detection problems into the aircraft maintenance log book. (Tr. 172).

Complainant testified that on September 18, 2000, he piloted an aircraft from Laredo, Texas to Indianapolis, Indiana. Upon

arrival, it was determined that a tail stand, which was installed on the aircraft in Laredo for loading purposes, was still attached to the aircraft upon arrival in Indianapolis. Complainant noted in the aircraft maintenance log book that the tail stand was found in place. (CX-19). After review, it was determined by maintenance personnel that there was no damage to the aircraft or the tail stand. (Tr. 174-75).

Complainant testified his first officer, Burleigh, reported installing the tail stand in Laredo, Texas, and the flight engineer, Nichol, reported observing the tail stand but answered in the pre-flight check the tail stand had been stowed. Complainant verbally reprimanded Nichol and Burleigh because of the seriousness of the incident and because the tail stand remaining in place during flight could have caused damage to the aircraft. (Tr. 176). Complainant testified he has had training in "CRM" or Crew Resource Management, which encourages communication and interaction between crew members. (Tr. 177).

Complainant testified while on the ground in Indianapolis on September 18, 2000, he telephoned Captain Spence about a delay in receiving fuel for the next leg of his flight. (Tr. 180-82). Having entered the tail stand incident on the maintenance log book, Complainant did not feel it necessary to raise the tail stand incident with Captain Spence because there had been no damage to the aircraft or the stand. (Tr. 182). He stated the log entry was faxed to the Respondent upon arrival at Indianapolis, Indiana, which is standard operating procedure. (Tr. 183). After refueling, the aircraft was assigned to fly to Austin, Texas. (Tr. 184). During flight, Complainant began having flight control problems which he determined would require maintenance and telephoned Captain Spence from the aircraft. It was agreed the aircraft should be flown to Alexandria, Louisiana, for maintenance. (Tr. 185). Complainant testified he again did not bring up the tail stand incident because there was no reason to do so during this flight and because of his overriding concern with the flight control problems. (Tr. 185-86).

On September 19, 2000, Complainant testified Captain Spence telephoned him in the morning and asked about the tail stand incident. Captain Spence indicated he had seen the log book entry and requested Complainant write an incident report. Captain Spence informed Complainant he did not think anything would come of it, but he thought a report should be prepared. Complainant testified he had, in fact, prepared a report as of September 18, 2000. (CX-6). He did not arrive at his home until the evening of September 19, and thereafter faxed the written report to the company on September 20, 2000. (Tr. 187-88). He was "on call" to fly on

September 20, 2000 and was, in fact, called by crew scheduling to fly an aircraft that day. (Tr. 188).

On September 20, 2000, Complainant was assigned a flight from Austin, Texas to a city in Mexico. (Tr. 190). The plane had smoke detector problems which Complainant wrote up in the maintenance log book. (Tr. 191). He described the problems as the smoke detector probes being "flush with the wall" lining whereas the probes should be extended one inch beyond the wall. On this occasion, Complainant telephoned Captain Spence at home to report the "maintenance fix" was to attach a plastic band on the probes, about which he expressed concern. Complainant also prepared an incident report. (Tr. 191-92). Captain Spence informed Complainant he would talk to maintenance. He later telephoned Complainant to report that maintenance indicated the plastic band fix was appropriate. (Tr. 192).

On September 21, 2000, Complainant was again telephoned by crew scheduling and assigned a flight which had oil temperature/maintenance problems causing the flight to be diverted or turned back. (Tr. 199-200; CX-39). Complainant prepared a log book entry and an incident report of the events. (Tr. 200).

Complainant testified that between September 18, 2000 and September 24, 2000, he maintained a company cell phone for purposes of communication with scheduling. He testified no one telephoned him about the tail stand incident although crew scheduling called him on September 20 and 21, 2000. (Tr. 202-04).

Complainant testified that on September 29, 2000, he received a telephone call from Human Resources who sought to confirm he had received a letter from the company which had been mailed on September 25, 2000. Complainant informed the Human Resources Department that he had not, but later retrieved a certified letter of termination on September 29, 2000. (Tr. 205). Complainant testified he assumed that because he had reported smoke detector issues and other safety issues during the last week, the company did not want to deal with him any longer. (Tr. 206-07). He then telephoned OSHA, FAA and the Inspector General. (Tr. 207-10). He informed each agency that he had been terminated because of safety concerns expressed while an employee of Respondent. (Tr. 210).

On October 18, 2000, Complainant completed and filed a complaint form with the Inspector General of the FAA. (Tr. 210-11; ALJX-1(e)). He also received a letter from OSHA indicating that they had received his complaint on December 7, 2000. (Tr. 212-16; CX-40).

The smoke detector problems reported by Complainant on August 17, 2000, September 2, 2000, September 6, 2000, and September 21, 2000 in the maintenance log book became matters of investigation by the FAA after his discharge. (ALJX-1(d)). On October 5, 2000, the FAA communicated with Bobby Raper, Vice President of Quality Control and Regulatory Compliance with Respondent, concerning their findings about the smoke detector problems. (Tr. 223-26; RX-21).

Complainant testified his base salary was approximately $7,000.00 per month and that he received overtime at the rate of about $80.00 to $90.00 per hour plus per diem. (Tr. 226-27). As an employee of Respondent, he was entitled to full medical and dental coverage, a basic life insurance policy and contributed to a 401K pension plan. Complainant testified he has not been able to replace his income or benefits since his termination from Respondent. He further stated he has applied to dozens of airlines around the world but has not received any employment opportunities. (Tr. 227).

Complainant is aware of the Aviation Records Improvement Act, which requires airlines to verify the personnel information reported by applicants with former employers and that a pilot's personnel file follows him to subsequent employment. (Tr. 227-28).

Complainant testified that on August 28, 2001, he began flying for an airline in Ft. Lauderdale, Florida, which maintained four aircraft. He was laid-off approximately three months later. His base salary was less than $2,000.00 per month and he had no benefits. (Tr. 232).

On cross-examination, Complainant testified the Mailer incident may have occurred in late 1999 and that he was not aware of Mr. Mailer's employer taking any action until the date of the hearing. (Tr. 262-64). He testified further he did not know if Mr. Truby was an employee of Respondent. (Tr. 266). He verified the ULD incident involving the snow accumulation was resolved by the cargo loaders removing the snow from the cans. He acknowledged he was not taken off flight status as a result of this safety concern. He further acknowledged both the Mailer and Truby incidents of overweight aircraft were corrected before he actually flew the aircraft. (Tr. 267).

Concerning the Geiselhart incidents, Complainant testified Mr. Geiselhart admitted he was flying on codeine, without strapping his seat belt and while reading a newspaper. (Tr. 273, 286-87). Complainant never accepted clearance without following the pre-flight checklist. (Tr. 269). Complainant testified he never received any complaints from crew members about his creating a

hostile environment in which to work or fly. (Tr. 274-75). Complainant had been informed that pilots were bidding away from him and that First Officer Olson had asked not to fly with him. (Tr. 278-79). Two of the three crew members, not the flight engineer, may have been taken off flight schedules with him, but Complainant was not certain. (Tr. 279).

Complainant testified he was not sure if he asked Mr. Geiselhart to respond to a checklist prior to a flight. He did not hold the flight because of Geiselhart's failure to use a seat belt. (Tr. 281-82). Complainant testified he flew on several days with Geiselhart during November 1999. (Tr. 286). He acknowledged that in August 1998 he complained about Geiselhart not wearing socks and reading a newspaper during flight. (Tr. 287-88). He acknowledged that due to his complaints about Geiselhart, Geiselhart was taken off check airman status. (Tr. 289-90). Complainant further acknowledged Captain Spence discussed "CRM" with him about his crew and the company as a result of his dealings with Geiselhart. (Tr. 290).

On March 8, 2000, Complainant received a tail skid warning light after take-off, which caused him to land the aircraft. After landing, Neil Johnson, Director of Safety for Respondent, showed up at the aircraft. (Tr. 291). He testified he did not ignore Johnson and when asked by Johnson what happened after take-off, he responded "nothing." (Tr. 292). He informed Johnson that Johnson was accusing him of something he knew nothing about. (Tr. 294). Complainant acknowledged after the tail skid incident, he was called to a meeting in Dallas at which Johnson was present. (Tr. 294-95).

Complainant prepared an incident report of the tail skid incident. (Tr. 295; ALJX-1(d)). Complainant informed Johnson that he had written up the incident in the maintenance log book. (Tr. 295-96).

Complainant acknowledged he filed his complaints with the FAA over the smoke detector problems after his termination, and not before. (Tr. 296). He was not pulled off flight status for writing up smoke detectors, nor was he called into the office to discuss those problems. (Tr. 296-97). He assumed Captain Spence had knowledge of the smoke detector problems from his morning meetings. Captain Spence did not tell him not to write up the smoke detector problems and did not discourage him from writing up safety problems. (Tr. 297-98). He was not told that he was terminated because he complained of smoke detector problems or because he filed complaints with the FAA. (Tr. 298-99).

Complainant testified that the three air turn-backs were not raised until after his termination and he is not contending anything was improper about the air turn-backs. (Tr. 299-300). He acknowledged the September 18, 2000 diversion to Alexandria, Louisiana, from Indianapolis was discussed with Captain Spence who encouraged him to go to Alexandria, Louisiana. (Tr. 300-01). Complainant was not pulled off flight status because of this diversion. A second air turn-back involving oil temperature occurred with the concurrence of Respondent and Complainant was not told not to turn back. The third diversion, involving a compressor problem, occurred as a result of Complainant conferring with the company and being told to divert the aircraft. (Tr. 301-02).

Complainant acknowledged he has never flown an aircraft with the tail stand attached except for the flight from Laredo, Texas to Indianapolis, Indiana. He does not know of any pilot who has flown an aircraft with an attached tail stand and acknowledged it is "an unusual occurrence." (Tr. 302). Complainant testified he and his crew performed a post-flight checklist upon arrival in Indianapolis on September 18, 2000. (Tr. 304).

The maintenance log book reflects the tail stand incident was entered by Complainant. (Tr. 305-06; RX-7). Complainant acknowledged he did not inform Captain Spence of the tail stand incident because he thought it had not caused damage. (Tr. 307). He acknowledged in his pre-trial deposition at page 79, that he described the tail stand incident as a "non-incident." (Tr. 310-11). Complainant testified he wrote the incident report on September 18, 2000, but did not hope Captain Spence would not see the log entry about the tail stand. (Tr. 311). He testified if the tail stand incident had caused damage to the plane he would have called Captain Spence about the incident. (Tr. 314). He acknowledged Captain Spence called him the following morning about the tail stand event and informed that he had seen the report about the flight with the tail stand installed. (Tr. 318-19). He asked Complainant to complete an incident report. (Tr. 319-20). Although the incident report was dated September 18, 2000, Complainant he did not fax the incident report to Captain Spence on September 18, 2000. (Tr. 320).

In a statement which Complainant provided to the Department of Labor during the investigation of this matter on February 23, 2001, prepared by Investigator Incristi, he stated that he <u>actually wrote</u> the incident report on September 20, 2000. He testified he faxed the incident report from his home on September 20, 2000. (Tr. 322, 344; ALJX-5). Complainant stated Captain Spence did not tell him to have better communications with his crew or flight operations as a result of the tail skid incident. (Tr. 325). He further stated

he was not told he was being terminated because he raised any safety issues in the past. (Tr. 326).

Complainant testified that after his termination he began a home-based business and received income from a rental of a duplex. (Tr. 327). His income, from the home-based business marketing health products on the Internet, was less than $400.00 per month. (Tr. 330). He has utilized a local store in his home town to handle a few of his health products and has tried to place products in stores in the San Antonio, Texas area which occurred before his termination. (Tr. 330-32). He was involved in a "sky biz" which went out of business in July or August 2000 before his termination. (Tr. 327-38).

On re-direct examination, Complainant testified the operations manual required crew coordination for pre-flight checks of "normals." (Tr. 333). A crew member is responsible to the Captain for their duty or function. (Tr. 334-35). Complainant testified the investigation into the tail stand incident was considered timely by the FAA but that the crew had engaged in negligent acts for which the commander of the aircraft was responsible. (Tr. 337-39; CX-20). No legal enforcement action was considered warranted after the investigation. (Tr. 338). The letter which was issued by the FAA as a result of the tail stand incident was placed in Complainant's file and will remain in his file for a two-year period. (Tr. 323).

Complainant testified no one from the Respondent ever told him specifically why he was terminated from employment. (Tr. 341).

Complainant testified the fuel delay which occurred on September 18, 2000, in Indianapolis was an unusual event because fuel is normally readily available. (Tr. 341-42). Because it was an unusual event, Complainant telephoned Captain Spence for assistance. (Tr. 342). Complainant acknowledged there is a requirement to report any mechanical difficulties or irregularities. He did not believe or think that the tail stand issue was a mechanical irregularity. (Tr. 343).

On re-cross examination, Complainant stated the incident involving the ULDs did not involve anything broken or needing repair, but he entered the incident in the maintenance log book of the aircraft. (Tr. 346). He acknowledged the FAA maintains a file on all pilots, to include their licensing certificates and letters issued for enforcement actions. (Tr. 348-49).

Complainant, in rebuttal, testified he submitted an incident report involving the tail skid incident by the time he returned to

home base and before the Dallas, Texas meeting with Dr. Johnson. (Tr. 666-67; ALJX-5). Complainant stated Dr. Johnson approached him and asked what happened. (Tr. 668-70). Complainant responded that he wrote-up the incident in the log and he had a tail skid light and returned to the site. Dr. Johnson responded, "do you want to tell me what really happened?" (Tr. 670). Complainant stated he had written the incident up in the log book and that it was now his task to get the express mail to Los Angeles as soon as possible. (Tr. 670-71). He informed Dr. Johnson that if the priority is an investigation, then "let's go get a cup of coffee, sit down and discuss the incident." (Tr. 671). Dr. Johnson responded, "if you don't answer my questions, the plane is not going anywhere." Complainant then answered, "I'm the pilot in command of this aircraft and I believe it's under my control and my superiors have told me to take this airplane with the express mail to Los Angeles . . ." (Tr. 671-72).

Dr. Johnson stated that the aircraft must have hit the skid. Complainant testified First Officer Morbitt performed the take-off when the tail skid incident occurred. (Tr. 673). Complainant stated, upon examining the tail skid, the top of the tail skid had come off the aircraft, not the bottom which is normally painted red to detect a strike. (Tr. 673-74). Complainant testified he communicated the incident by writing it in the maintenance log which he felt was sufficient. (Tr. 680-81).

Complainant testified upon return from a brief trip on September 29, 2000, he reviewed his telephone messages and had no messages from Captain Knapp, who allegedly wrote on his termination letter that he had telephoned Complainant on two occasions on September 25, 2000, and left messages. (Tr. 684-85; RX-8).

Complainant stated he attempted to follow the law and the FAA rules and regulations by communicating through phone calls, log entries and incident reports in all cases. (Tr. 690). He stated the communications he was providing to Respondent were obviously not received in the manner which he attempted to give them. (Tr. 690-91).

Maynard "Skip" Spence

Captain Spence was called as an adverse witness by Complainant. He is the Vice-President of Flight Operations and began employment with Respondent in April 1991. (Tr. 46). He was the Director of Operations in June 1995 when Respondent voluntarily ceased operations because of maintenance issues related to the company's inability to show compliance with various repair parts. He testified that the voluntary grounding of aircraft was not an

operations or pilot issue. (Tr. 46-48).

He hired Complainant as a Captain because of a turnover in pilots. (Tr. 54). He considered Complainant a good "stick and rudder" pilot but that there was more to flying an aircraft than being a good "stick and rudder" pilot. (Tr. 55).

On March 14, 2000, Captain Spence held a meeting with Complainant about the tail skid incident. (RX-2). He was not aware of Complainant's memorandum to the FAA at the time of the meeting. (Tr. 56). He reported Complainant made him aware of the memorandum after the meeting. He acknowledged Complainant was removed from flight status for purposes of this meeting. (Tr. 57). Captain Spence noted in his "memo of record" that Complainant agreed to conduct his operations with a positive attitude and be more communicative with Captain Spence and flight operations. Captain Spence testified he never had any contact from the FAA nor did he discuss the issues in Complainant's memorandum with Mike Mills of the FAA. (Tr. 58).

Captain Spence recalled incidents on May 12, 1999 and August 12, 1999, involving overweight aircraft which may have resulted in his discussing the issue with the FAA. (Tr. 63-64). Captain Spence considered the Gieselhart incidents, which involved Mr. Geiselhart's conduct on a flight where he was acting as an instructor/flight engineer, an in-house matter. (Tr. 64-65).

Captain Spence recalled an incident on January 1, 2000, where ULDs, which are metal containers used to store mail and other cargo in the cargo compartment of an aircraft, were covered with snow. (Tr. 65). He indicated Respondent's manager of cargo-handling may have discussed this matter with the FAA. Respondent agreed with Complainant's contention that ULDs covered with snow should not be loaded onto an aircraft. Regarding the tail skid incident, which occurred in March 2000, Captain Spence testified he was certain he discussed the issue with the FAA, but not because of Complainant's complaint. (Tr. 66).

Captain Spence conducts a daily morning meeting with management officials at 9:15 a.m. (Tr. 67). The Maintenance Department conducts a meeting at 8:30 a.m. on a daily basis, at which time the aircraft maintenance log entries from previous flights are reviewed. The aircraft log entries are faxed to the Flight Operations or Maintenance Department on a daily basis. (Tr. 67-68). Captain Spence stated aircraft diversions or turn backs are discussed at the management meeting because it is an issue of flight safety. (Tr. 68). Further, any abnormal activity in the company's operation is discussed at the morning management meeting.

(Tr. 69). The normal operation of Respondent requires that a report be generated to inform FAA of any abnormal activity and for purposes of making corrections to such activity. (Tr. 69-70).

Captain Spence testified the tail stand incident, which occurred on September 18, 2000, should have been a matter for discussion at the early morning meetings. He was first informed of the incident by hearing "bits and pieces" of the event in the Operations Center. (Tr. 71-72). He stated that at 9:30 a.m. the flight arrived at Indianapolis and a log entry was made prior to departing for Alexandria, Louisiana. (Tr. 72-74).

Captain Spence acknowledged the General Operations Manual dated October 10, 1996 at page 12, section 7, entitled "Reporting an Emergency" specifies that a written incident report is to be prepared no later than return to base. (Tr. 76-77; CX-26). He acknowledged that on September 18, 2000, Complainant was based in San Antonio, Texas, and did not return to home base until late September 19, 2000. (Tr. 78-79). He further acknowledged Complainant submitted an incident report of the tail stand on September 20, 2000. (Tr. 79).

Captain Spence observed the General Operations Manual at page 20, section 7, dated July 6, 1996, entitled "Reports by Captain" reinforces the need for a written report on "irregularities" listed thereat. The responsibility to identify and remove the tail stand is an item of the checklist which requires the flight engineer to remove the tail stand. (Tr. 79-82; CX-29).

The Boeing 727 Aircraft Operations Manual dated October 30, 2000, which was in effect on September 18, 2000, sets forth "just priors" to pushing-off the aircraft, that the flight engineer is designated to respond to the checklist item regarding the status of the tail stand. (Tr. 83-86; CX-29). Captain Spence acknowledged a pilot can and must rely upon his crew doing their job and verifying the status of items on the checklist. He further acknowledged the flight engineer on this particular flight did not do his job of stowing the tail stand and verifying the tail stand was still attached to the aircraft. (Tr. 87).

Captain Spence testified that on September 18, 2000, he received a telephone call from Complainant regarding a problem obtaining fuel for his aircraft. (Tr. 88-89). Captain Spence stated Respondent is a supplemental and non-scheduled carrier, which is subject to the same rules on safety as all other carriers, and sometimes it is difficult to attain fuel for its planes. He noted the September 18, 2000 flight was a "ferry flight," or an empty plane. (Tr. 90-91). Captain Spence acknowledged that on

September 18, 2000, while in flight, Complainant telephoned him concerning flight controls and that the aircraft was not flying straight while en route to Austin, Texas. He agreed with Complainant's assessment and the aircraft was diverted to do major maintenance at Alexandria, Louisiana. (Tr. 92-94). Captain Spence testified complaints about safety are not a superfluous gripe and no safety issues are superfluous. (Tr. 95).

On September 19, 2000, he telephoned Complainant about the aircraft. Captain Spence stated he wanted to know about the tail stand incident and wanted to know if Complainant had flown from Laredo, Texas to Indianapolis, Indiana with the tail stand attached to the aircraft. Complainant informed him that he "did not know," but he had made a log book entry. (Tr. 95-97). Captain Spence stated he wanted Complainant to call him about the incident, which he considered a serious safety issue, and wanted Complainant to report the incident so he could investigate the matter. Such reporting would also include reports from the flight engineer as well as the first officer. (Tr. 98). Complainant submitted an incident report subsequently. (Tr. 99; CX-6). Captain Spence testified he did not talk to the flight engineer in person until October 2000. (Tr. 98-99).

Captain Spence acknowledged that as part of the FAA investigation into Complainant's termination, he provided a statement dated April 11, 2001 in which he commented that the tail stand incident was the "last straw." Captain Spence testified the comment had no significance and it did not pertain to safety issues but rather discussions with Complainant about CRM issues. (Tr. 102-03; CX-18).

Captain Spence testified Crew Resource Management (CRM) involves interaction, interrelationships and communication between the crew about safety issues and other concerns, such as emergencies and their ability to solve problems and prevent accidents. (Tr. 104). He removed Complainant from his flight schedule as well as removing others, but with pay as an administrative action. (Tr. 106). He acknowledged, however, there was no written evidence of any other pilots or flight officers removed from flight schedules other than Complainant. (Tr. 107).

In his pre-trial deposition, Captain Spence acknowledged the tail stand incident was the "final straw" of actions and inactions by Complainant. One of the inactions by Complainant was his opportunity to inform Captain Spence of the tail stand incident which he did not do in a timely manner. (Tr. 112). Captain Spence testified the aircraft log book entry was not enough nor was the incident report. He expected more of Complainant because of his

experience. Captain Spence testified he decided to terminate Complainant because he believed their relationship was regressing. (Tr. 114-15).

Captain Spence informed Chief Pilot Knapp to find Complainant and the other two crew members involved to discuss the incident. (Tr. 115). His decision to terminate Complainant had to be approved by the CEO and "others." His decision was reached over a period of days while Complainant was still flying Respondent's aircraft. (Tr. 116-17). Captain Spence stated his decision to terminate Complainant was because Complainant was "incommunicado." (Tr. 118). Captain Spence did not take Complainant off flight schedule and did not tell him to report to a meeting to discuss the tail stand incident. (Tr. 121). Captain Spence expected Complainant to talk to him about the tail stand incident. (Tr. 122). Complainant's termination letter was written by Chief Pilot Ed Knapp and not Captain Spence. (Tr. 123).

Captain Spence acknowledged that on September 20, 2000, smoke detectors on the aircraft assigned to Complainant were damaged and were so reported by Complainant. (Tr. 124). He testified if the FAA investigated the smoke detector problems it would have involved maintenance and not operations. (Tr. 126).

Captain Spence requested an incident report from First Officer Todd Burleigh about the September 18, 2000 tail stand incident, who sent an e-mail on October 6, 2000. (Tr. 129; CX-22). He also received an incident report dated October 5, 2000, regarding the tail stand incident from Flight Engineer Nichol. (Tr. 127-28; CX-21). Captain Spence arranged a meeting with Nichol and Burleigh on October 10, 2000, and sent an e-mail to Bud Phillips, the Chief Operating Officer of Respondent. (Tr. 132-33; CX-24). On October 10, 2000, Captain Spence sent an e-mail to Chief Pilot Knapp removing Nichol and Burleigh from flight status without pay for two weeks. (Tr. 133-34; CX-23). On October 13, 2000, Chief Pilot Knapp sent a letter to First Officer Burleigh suspending him for two weeks for his part in the tail stand incident. (Tr. 135-36; CX-25).

Captain Spence acknowledged there was no meeting with Complainant between September 18, 2000 and September 25, 2000 regarding the tail stand incident prior to his termination. (Tr. 136-37).

On direct examination in Respondent's case-in-chief, Captain Spence testified he has had no violations cited by the FAA. (Tr. 371). During the Complainant's interview, he informed Complainant that Respondent has a good relationship with the FAA and would

maintain that relationship. (Tr. 372). He acknowledged it was not normal to hire a Captain in the industry, but because of high turnover Complainant was hired for that position. (Tr. 372-73).

Captain Spence testified he was sure the company had removed Captains from flight status for investigative purposes in the past. He recalled one incident involving an extended over-water flight where a pilot was called-in and still paid as if he were on flight status. (Tr. 373). He stated he would rather the Chief Pilot meet with the Captains because they work for him. (Tr. 374). Captain Spence testified he wants pilots to telephone him on unusual occurrences because he wants to know and because Respondent is a small company. (Tr. 374-75).

Captain Spence observed that an unusual occurrence was "not normal." He testified he considered "timely" to be as soon after the incident as possible, "right after landing the aircraft." (Tr. 380). Operations bulletins, which are issued from time to time, are assembled in a reading file, which is a three-ring binder that goes out with the flight release. (RX-24). Within the operations bulletin, an incident report for an unusual occurrence is required "immediately," which to Captain Spence means as soon as the pilot lands the aircraft. (Tr. 381-82). He stated a pilot should not wait two days to prepare an incident report. (Tr. 383).

Captain Spence testified he encourages and supports pilots who go to the FAA with safety complaints. He recalls on one occasion accompanying a pilot to FAA to discuss containers which were not locked down in a European airport. The containers were shifting during flight. (Tr. 384). The pilot was taken off flight status and brought back to the United States. He accompanied the pilot to the FAA to lodge a safety complaint. (Tr. 385).

Captain Spence testified he informed Complainant that he encouraged pilots to go to the FAA with safety complaints and recalls informing Complainant of such encouragement during the tail skid incident. (Tr. 385-86).

Captain Spence testified during the Tom Truby incident, when he called Complainant into Dallas for a meeting, Complainant was taken off flight status, but paid for the time he was off flight status. (Tr. 386-87). With regard to the Truby incident, he stated Complainant did the right thing in complaining about weight supports and the incident played no role in his decision to terminate Complainant. (Tr. 387).

Captain Spence testified he also supported Complainant's complaints about overweight cargo in the Mailer incident and

because Mr. Mailer refused to identify himself while on the aircraft, Complainant was within his authority to question a "stranger on his plane." (Tr. 387-88). Captain Spence stated the incident involving Mr. Mailer did not play a role in his decision to terminate Complainant. (Tr. 389).

Captain Spence testified Complainant handled the ULD incident, or snow on cargo cans, properly. He recalls asking Complainant to talk to Melvin Starks, who is in charge of cargo handling, and Complainant did so to straighten out the problem. (Tr. 389). Captain Spence stated the ULD incident did not play a role in his decision to terminate Complainant. (Tr. 390).

Captain Spence testified the Geiselhart incidents were personally investigated and he recalls receiving a telephone call from Complainant with his concerns of Geiselhart not fastening his seat belt and not responding to a checklist. Complainant wanted Geiselhart removed from his aircraft and flight schedule. (Tr. 390-91). Captain Spence indicated this was a "PIC" or pilot-in-command issue and Complainant had the authority and obligation to deal with such matters, however Complainant informed him it was not his responsibility, but rather Captain Spence's responsibility to resolve. (Tr. 391). Captain Spence talked to Geiselhart and First Officer Olson about the incident. (Tr. 396-97). He testified he counseled with Complainant about "CRM" to facilitate crew members working together, but provided no discipline for the incident. (Tr. 397). Captain Spence indicated he emphasized to Complainant the need to raise issues and communicate with him because Complainant needed to improve his CRM. (Tr. 398-99). Captain Spence indicated he informed all involved in the incident to improve their CRM as well. He stated Geiselhart's status as line check airman was rescinded for a period of time because of the incidents. (Tr. 399). He stated Complainant was cooperative, but did not share any blame for the incident. (Tr. 400). Captain Spence testified the incident involving Geiselhart did not play a role in his decision to terminated Complainant. (Tr. 401).

Captain Spence testified, regarding the tail skid incident, he received a telephone call from dispatch informing him that a plane had an air turn-back. (Tr. 402-03). Thereafter, he called Complainant, his crew, and Neil Johnson, the Director of Safety, into a meeting in Dallas, Texas, to investigate the incident. (Tr. 403). This meeting was conducted on March 14, 2000, and afterwards Captain Spence prepared a memo of record regarding the meeting. (Tr. 403-04; RX-2). During the meeting, Complainant wanted to know why Truby and Mailer were not in attendance at the meeting, but the meeting was about only the tail skid incident. (Tr. 404-05). Captain Spence retained the memo of record in Complainant's file

but did not give a copy of the memo to Complainant. (Tr. 409). Complainant was taken off flight status to attend this meeting, but was paid for the time he missed any flight schedules. (Tr. 411).

Captain Spence testified there was a difference of opinion between Neil Johnson and Complainant. (Tr. 410). He had to facilitate the meeting, which was also attended by First Officer Morbitt and Second Officer Art Sager. He stated Morbitt and Sager were already off flight status at the time of the meeting. (Tr. 411). Captain Spence testified the tail skid incident and the meeting with Complainant and others in attendance did not play a role in his decision to terminate Complainant. (Tr. 412). The investigation of the tail skid incident revealed that the skid had broken, but it could not be determined if the skid was broken during take-off, landing or in maneuvering. (Tr. 413-14). The concern expressed by Captain Spence was the manner in which Complainant interfaced with Neil Johnson during the incident. (Tr. 414-15). Captain Spence testified the "CRM" among Complainant and his crew did play a role in his decision to terminate Complainant. (Tr. 413).

Captain Spence received one telephone call from Complainant about smoke detector probes and the use of plastic rings to fix probes which were not extended from the walls. (Tr. 415-16). He recalled telephoning maintenance, who informed him the detectors were being repaired in the manner stated in the maintenance manual. (Tr. 417-18). He then informed Complainant that the maintenance fix was proper. (Tr. 418). Captain Spence testified he was not aware of an investigation conducted by the FAA of the smoke detectors at the time he decided to terminate Complainant. If such an investigation was conducted by the FAA, maintenance would have dealt with the investigating agent. Bobby Raper, as Director of Maintenance, has direct liaison on all safety issues with the FAA. (Tr. 419). Captain Spence testified Complainant's complaints about the smoke detector probes played no role in his decision to terminate Complainant. He further stated complaints made by Complainant to the FAA did not play a role in his decision to terminate Complainant. (Tr. 420-21).

Captain Spence testified regarding the three aircraft diversions which occurred in September 2000, he was aware and participated in the decision to divert Complainant's aircraft from Indianapolis en route to Austin to Alexandria, Louisiana. Complainant had reported flight control problems and excessive trim in controlling the aircraft. (Tr. 421). Captain Spence testified the excessive trim in flight occurred after the tail stand incident of September 18, 2000, and Complainant had no complaints before

landing the aircraft with trim or flight controls. (Tr. 422). He stated, however, the diversion to Alexandria, Louisiana, and the problems with flight controls and Complainant's complaints thereof played no role in his decision to terminate Complainant. (Tr. 423).

Captain Spence testified he supports the judgment and decision of Complainant to turn back an aircraft on September 20 or 21, 2000, when an oil temperature problem occurred. (Tr. 423). He also supported the decision of Complainant to turn back an aircraft on September 23, 2000, which developed a compressor problem. He stated he was aware of the decision to turn back the aircraft before he decided to terminate Complainant. These turn backs, based on Complainant's judgment, played no role in his decision to terminate Complainant according to Captain Spence. (Tr. 424).

Captain Spence testified the tail stand is a device used to balance the aircraft during loading and unloading. (Tr. 425; RX-44). The tail stand keeps the aircraft from tipping on its tail, and, after loading or unloading, it should be stowed. The skid was designed for aerodynamic reasons. (Tr. 426-27). A tail stand was estimated to weigh about 40 to 45 pounds and is installed after landing, pursuant to the checklist. (Tr. 428-29). Captain Spence testified flying with a tail stand installed is a serious incident because it may become detached, fall and could cause damage to the aircraft or articles on the ground. (Tr. 429). Captain Spence, who has 18,000 flight hours, testified he has never flown with a tail stand installed and he considered such an event to be a very unusual occurrence. (Tr. 430).

Upon reviewing the aircraft maintenance log for September 18, 2000, Captain Spence testified time entries are made based on Zulu time, which is a five-hour difference from central daylight time. The log reflects that the wheels of the aircraft were blocked at 14:53, which is 9:53 a.m., in Indianapolis. The time at which the aircraft wheels were blocked occurred after the morning management meeting. (Tr. 433). Captain Spence testified the entry of the tail stand being in place upon arrival at the Indianapolis destination was required to be made as it was a mechanical irregularity. (Tr. 433-34). He stated the company expectations were that such an event be placed in the aircraft maintenance log. (Tr. 434). He first heard of the tail stand event in the flight operations area and called Mark Howell, the company supervisor in Indianapolis, who informed him of a report from a maintenance man who was an eye witness to the arrival of the aircraft and reported something attached to the "aft" of the aircraft fuselage. (Tr. 434-37).

Captain Spence recalled speaking with Complainant about the fuel problem but Complainant did not mention the tail stand. (Tr. 437). Captain Spence stated Complainant is expected to report such irregularities. (Tr. 438). He had no knowledge of the tail stand incident at the time of the conversation with Complainant regarding the fuel shortage. (Tr. 438-40). Captain Spence testified he next spoke with Complainant concerning the flight controls and the diversion to Alexandria, Louisiana. Complainant did not mention the tail stand incident during this conversation. Captain Spence stated he called and left a message in Alexandria, Louisiana, for Complainant to telephone him after "touch down." (Tr. 440). Complainant landed in Alexandria at 19:54, or 2:54 p.m. Complainant telephoned Captain Spence, but did not raise the tail stand issue. (Tr. 441). Captain Spence asked Complainant if he had flown the aircraft with the tail stand installed to which Complainant responded he was not certain. (Tr. 441-42). Captain Spence informed Complainant he had a report that he had done so, to which Complainant responded, "it must be what we did." (Tr. 442). Captain Spence requested that Complainant prepare a written report. Captain Spence testified this conversation revealed Complainant was not being forthright with him and was being evasive concerning the tail stand incident. (Tr. 446-47, 449).

Captain Spence prepared a chronology of the events of September 18, 2000. (See RX-1; Tr. 442). He testified he should not have to "discover" such matters and he expects more than minimal information from a Captain employed by the company. (Tr. 448). Captain Spence stated he expected a written report that day or that night by facsimile since the tail stand incident was an unusual occurrence. (Tr. 450). Upon reviewing the incident report prepared by Complainant, (CX-6), Captain Spence agreed the report stated the facts but should have been more thorough and detailed. (Tr. 451). In comparison, First Officer Burleigh prepared a report which Captain Spence considered to be "more complete." (Tr. 452, 454; RX-9). Flight Engineer Nichol also prepared a report on October 5, 2000, which Captain Spence considered "very complete." (Tr. 456; RX-10). Both reports mentioned poor lighting in the Laredo, Texas parking lot while loading as well as a lack of "wands by customs," which Complainant had not mentioned in his entry in the log or in his incident report. (Tr. 454-61).

Captain Spence decided to terminate Complainant because he did not receive a timely report on the tail stand and because of confrontational issues with his crew and others in the past. (Tr. 461-62). Captain Spence thought their relationship was going backward and not forward, and he did more counseling with Complainant than any other pilot employed by Respondent. (Tr. 462-63). Captain Spence made the decision to terminate Complainant

over a period of days and the letter of termination was dated September 25, 2000. (Tr. 463-65; RX-60). Captain Spence discussed his recommendations with Bud Phillips, the Chief Operations Officer and Ed Knapp, the Chief Pilot. He received no pressure from either Phillips or Knapp to terminate Complainant. (Tr. 461-62, 467). Captain Spence testified the safety issues and concerns raised by Complainant played no role in his decision to terminate Complainant. (Tr. 472). He stated First Officer Burleigh and Flight Engineer Nichol were subsequently suspended for two weeks for their participation in the tail stand incident. (Tr. 472-73). Captain Spence did not personally attempt to contact Complainant about his decision, but instead requested that Chief Pilot Knapp attempt to contact Complainant. (Tr. 467-72).

Captain Spence testified he is familiar with the Aviation Records Improvement Act which requires that a company receive flight information and disciplinary information on any prospective pilots hired by the company. (Tr. 473). Any disciplinary actions by the company within the last five years are retained by an employer under the Act. (Tr. 474). Captain Spence testified the termination letter issued to Captain Spence indicated his termination was "at will" rather than for cause. The decision to terminate Complainant's employment based on an "at will" characterization was made by Human Resources and not by Captain Spence. (Tr. 473). First Officer Burleigh was disciplined with a two-week suspension and issued a letter of discipline. (Tr. 474; RX-14). Flight Engineer Nichol was also issued a disciplinary letter and a two-week suspension. (Tr. 476; RX-13). Captain Spence testified that a certificate action taken against a pilot affects his airman certificate issued by the FAA if the pilot is suspended or terminated. (Tr. 481-82). Such a certificate action is part of the enforcement action by the FAA. Captain Spence testified the tail stand incident was investigated by the FAA which determined that the complaint was timely filed. (Tr. 482). He stated the FAA's determination of a timely filing had no bearing on the company's decision to terminate Complainant. (Tr. 483).

On cross-examination, Captain Spence testified he supports pilots going to the FAA. (Tr. 484). He acknowledged that when he accompanied a pilot to the FAA, Respondent was being investigated by the agency and he accompanied the pilot during the investigation to help explain the pilot's actions. (Tr. 484-85). The pilot did not report safety concerns to the FAA. (Tr. 485). Captain Spence acknowledged there is no occasion where a pilot has complained to the FAA other than safety complaints made by Complainant. (Tr. 487). He stated a removal from flight status is not a disciplinary action because it does not affect the pilot financially and is only conducted to facilitate discussion with the pilot. (Tr. 487-88).

Captain Spence acknowledged he had no other records of any other pilots being removed from flight status to attend meetings with him. (Tr. 489).

Captain Spence testified regarding the Truby incident, he does not recall if he talked to Truby about Complainant. He agreed with the complaints made by Complainant regarding the ULD snow issue. (Tr. 494). Captain Spence talked to Melvin Starks about the ULDs and the snow accumulation but does not think he issued an operations bulletin regarding that matter. (Tr. 495).

Captain Spence testified Complainant had feelings of persecution by Respondent. (Tr. 495-97). Captain Spence's goal was to change Complainant's attitude. He stated that Complainant did not effectively communicate on the tail skid issue or on the Geiselhart incidents. (Tr. 498). Captain Spence acknowledged, however, that Complainant constantly communicated, but his communications were less than timely and less than forthright. (Tr. 498-500). He acknowledged the Truby incident and the complaints about overweight aircraft made by Complainant were timely, as were the complaints about overweight aircraft involving Mr. Mailer and the ULD snow issue. Captain Spence also acknowledged the smoke detector incidents about which Complainant complained were also timely complaints. (Tr. 500). According to Captain Spence, Complainant, as the pilot-in-command had control over an instructor on his aircraft such as Mr. Geiselhart and, contrary to his opinion, Mr. Geiselhart's conduct was a matter that was within Complainant's control. (Tr. 501-05).

Captain Spence emphasized the long history of counseling and communication were factors in his decision to terminate Complainant. (Tr. 506). He stated the safety issues and concerns raised by Complainant did not constitute reasons for terminating Complainant, but the counseling about his confrontational attitude were factors in the decision to terminate Complainant. (Tr. 507-08). He affirmed he had no problems with "anything [Complainant] ever raised with him." (Tr. 527).

Captain Spence acknowledged there was no damage to the tail skid or the compressible cartridge contained within the tail skid. (Tr. 508-09). Captain Spence acknowledged that on September 20, 2000, Complainant's termination was being discussed when he telephoned Captain Spence at his home regarding the smoke detector problems. (Tr. 514-15). Captain Spence did not raise Complainant's termination with him at that time. (Tr. 515).

Captain Spence acknowledged the log entry regarding the tail stand issue on September 18, 2000, was faxed to Respondent. (Tr. 517-18). To his knowledge, there was no connection between the tail stand remaining in place during flight and the flight control problems encountered by Complainant thereafter. (Tr. 519). He further acknowledged the first officer and flight engineer on that particular flight neglected in their duties to identify the installed tail stand and Complainant must be able to rely upon their performance of duty. (Tr. 522).

Although Complainant was discharged prior to the incident reports prepared by First Officer Burleigh and Flight Engineer Nichol, Captain Spence did not consider the reports self-serving. (Tr. 529-34). He acknowledged their reports were not timely as they were submitted after Complainant's discharge. (Tr. 541). He did not call a meeting and take Complainant or his crew off flight status to discuss the tail stand issue, although he considered it a serious incident. (Tr. 540-42).

On re-direct examination, Captain Spence affirmed flight records are periodically purged and therefore there were no records of other pilots being taken off-duty or off of flight schedules. (Tr. 567). Captain Spence acknowledged the aircraft maintenance logs are faxed by the crew to the Scheduling Department for purposes of maintaining flight times to assure pilots do not exceed the Federal Aviation Regulation time limits. (Tr. 568-69).

Bud Phillips

Mr. Phillips testified he has been in aviation since the mid-1960's. He served as the Chief Operating Officer for Respondent from March 1998 through September 2001. (Tr. 237). As Chief Operating Officer, he had overall operations responsibility for flight and maintenance. (Tr. 238). He is also a pilot with 13,000 flight hours. (Tr. 237).

Mr. Phillips met Complainant on one occasion. (Tr. 238). He recalled Tom Truby was a former employee of Respondent who was recalled on a contract basis in Indianapolis, Indiana, and reported directly to the Chief Executive Officer of Respondent. (Tr. 238-39). Mr. Truby had a conflict "on two or three occasions" with Complainant over flight delays. He arranged a meeting with Truby and Complainant in Dallas, Texas, however, Truby declined to attend the meeting. He stated Complainant was pulled off flight status only for the meeting, but was paid for his time off flight status. (Tr. 239). As a result of Truby's failure to attend the meeting, Mr. Phillips testified he disregarded Truby's complaints concerning Complainant. (Tr. 240).

Mr. Phillips recalled an incident involving Mr. Mailer in a load-balance overweight problem. He stated Complainant's complaint was a legitimate complaint for which he wrote a letter to Mr. Mailer's company. (Tr. 241-43; RX-37). Having received no response to his initial letter, he then prepared a second letter. (Tr. 243-44; RX-39). He received a telephone call from Mr. Mailer's supervisor and Mr. Mailer was thereafter properly instructed concerning overweight and balance problems. (Tr. 245).

On cross-examination, Mr. Phillips testified it would surprise him if Complainant were off the flight schedule the week of the Truby meeting in Dallas. (Tr. 247). He stated the tail skid incident involved a warning light which came on as a result of flight spoilers being activated. (Tr. 249).

Mr. Phillips was consulted by Captain Spence and Captain Knapp about the timeliness of Complainant's complaints concerning the tail stand incident. Captain Spence recommended termination of Complainant. (Tr. 250-51). Mr. Phillips testified the flight engineer has the duty to respond to the checklist regarding the tail stand placement. (Tr. 252). He further testified the Captain has responsibility for the aircraft and the crew. (Tr. 253).

Dr. Neil Johnson

Dr. Johnson earned a Ph.D. in research psychology. (Tr. 615). He is presently employed by Westwood Colleges of Aviation Technology. (Tr. 613). From March 1998 through March 31, 2000, he was employed by Respondent as Director of Safety. He is a former U.S. Army aviator and worked for United Airlines for ten years before owning his own company. He has 7,000 flight hours as a pilot. (Tr. 614).

Dr. Johnson testified the Director of Safety was formally created by the FAA to keep management informed of safety issues and to develop a free flow of information. (Tr. 615).

He has been involved in "CRM" since 1979 when it started in the aviation industry. He was part of a working group between NASA, the FAA and selected airline personnel. He stated that generally the technical training was considered very good in the airline industry, but "CRM" needed to be addressed concerning the cognitive and management skills of a pilot with the crew. (Tr. 616-17).

He indicated that on the occasion of the tail skid incident involving Complainant in March 2000, he was in Portland, Oregon, conducting a safety audit. (Tr. 619). Bud Phillips telephoned him

and related an air return had occurred and it looked like a tail strike. (Tr. 620). Dr. Johnson went to the site and he, the station manager and a mechanic looked at the tail skid involved in the aircraft. (Tr. 620-21). He attempted to talk to Complainant who was preparing to depart in another aircraft. (Tr. 621-22). He testified the first officer would not talk to him. He asked Complainant about the tail skid to which Complainant responded, "nothing happened." Dr. Johnson informed Complainant he was Director of Safety and tried to ascertain the facts of the incident. He testified Complainant responded, "Now, you're accusing me of something that you don't know nothing about." (Tr. 622). Complainant further stated he was a captain with 18,000 flight hours and that he was going to call his attorney. (Tr. 622-23).

Dr. Johnson testified Complainant's response did not exhibit good "CRM." (Tr. 623). Dr. Johnson stated Complainant exhibited a "total lack of professionalism," was belligerent, loud and dismissed Dr. Johnson by turning his back and began doing other things. (Tr. 624-25; RX-33). He stated, however, that Complainant, the first officer and the flight engineer accompanied him to the aircraft involved in the tail skid. (Tr. 626). The crushable cylinder contained within the tail skid device had not been found at the time of their viewing the aircraft. Complainant informed Dr. Johnson that if the cylinder was not found, the incident did not happen. (Tr. 627).

Dr. Johnson acknowledged he did not look at the aircraft maintenance log to determine whether any entries regarding the tail skid had been entered. He stated Complainant's behavior was irresponsible and reprehensible. He further stated Complainant refused to write an incident report until Captain Spence told him to do so. (Tr. 628).

Dr. Johnson also acknowledged that subsequently the crushable cylinder was found, but he does not remember going back to discuss this finding with the crew. (Tr. 629-30). He stated he had never encountered a crew who refused to talk to him. (Tr. 631).

Dr. Johnson testified he and Complainant were called to Dallas, Texas for a meeting with Captain Spence. (Tr. 632). The whole crew of the aircraft was present. Captain Spence counseled Complainant on timely reporting and communications during the meeting. (Tr. 633). Dr. Johnson testified Complainant's attitude is that he is above being questioned. (Tr. 633-34). He further stated "CRM" was designed to fix the "anti-authority" attitude exhibited by Complainant. According to Dr. Johnson, an "anti-

authority" attitude involves a pilot making his own rules and following them, but not following the company rules. (Tr. 634). He further testified the traits exhibited by Complainant, such as his lack of communication and his anti-authority attitude, were markers of a lack of management skills. (Tr. 635). He stated that while employed with Respondent, he taught "CRM" classes and performed annual updates pursuant to FAA regulations for all crew member employees. (Tr. 636).

On cross-examination, Dr. Johnson testified the company which he formed offered flight training. (Tr. 637). He affirmed he knows Mr. Geiselhart, who taught "CRM" for Respondent before Dr. Johnson assumed those duties. (Tr. 639-40).

Dr. Johnson acknowledged that although the first officer refused to talk to him as Director of Safety during the tail skid incident, he did not write a memo concerning the first officer's response to his inquiries. (Tr. 641-42). He further acknowledged the tail skid, which had metal bladed-off the skid, and the missing crushable cylinder were not damaged during the incident. (Tr. 643-44). There were strike marks on the tail skid and he had never seen one knocked-off before. As a result of his investigation, he could not conclude what happened. (Tr. 645). He stated the tail skid warning light did come on during flight. (Tr. 646). He reported the flight engineer informed him that the strike marks were not present on the tail skid before flight. (Tr. 648). Dr. Johnson denied Complainant ever said, "let's leave the cockpit and go to a building to talk about the tail skid incident." He further stated First Officer Morbitt informed him that Complainant did not mean to be uncooperative and continued to make such statements during the inquiries by Dr. Johnson. (Tr. 652).

The tail skid incident was reported to the FAA, however, the FAA would not investigate such incidents and left it to the company to investigate. (Tr. 654). Dr. Johnson never fully developed the facts relating to the tail skid incident and could not determine if a tail strike actually occurred. (Tr. 655-56).

On re-direct examination, Dr. Johnson acknowledged Complainant informed him that the air return of the aircraft occurred because the tail skid warning light had come on. (Tr. 657). On re-cross examination, Dr. Johnson stated the light comes on if the skid is hit or a failure in the electrical system occurs. (Tr. 658).

Stephen Thompkins

Mr. Thompkins is the Executive Vice-President and General Counsel of Respondent and is responsible for Human Resources. He

testified he is familiar with Complainant's termination. (Tr. 547). He stated Captain Spence had a number of issues with Complainant, including the tail stand incident, regular communications to be maintained with Captain Spence and prior instances involving conduct such as his belligerent attitude toward Neil Johnson and "CRM" issues. (Tr. 547-49). Mr. Thompkins testified he concurred in the recommendation to discharge Complainant. (Tr. 549).

Complainant was issued a termination letter which does not specifically state the reasons for his termination. (RX-60). The discharge was characterized as "at will" by Mr. Thompkins. Upon employment all employees acknowledge they are "at will" employees under Texas State law. Mr. Thompkins testified if an employee is discharged "for cause," he has no entitlement to benefits, severance pay or any accrued vacation. (Tr. 550). He decided that characterizing Complainant's termination as "at will" was "more compassionate." (Tr. 552). He also stated Complainant would receive severance pay and any accrued vacation in an "at will" termination. (Tr. 550-51). Complainant was terminated "at will" because he was unable or unwilling to comply with company policy. (Tr. 551).

On cross-examination, Mr. Thompkins testified he believed Captain Spence had adequate reasons for terminating Complainant. (Tr. 554). He stated that as a result of his characterization of Complainant's termination as "at will" Complainant was paid two weeks of severance pay. (Tr. 578-79; CX-43).

Bobby Joe Raper

Mr. Raper is Vice-President of Regulatory Affairs and Quality Control. His background includes working as a mechanic and inspector for various airlines, including Braniff Airlines for 29 years. (Tr. 582). He began employment with Respondent in February 1995. (Tr. 583).

He testified he does not know Complainant and the FAA does not identify persons who file complaints for investigation. (Tr. 584). He testified that if the FAA conducted an investigation concerning smoke detectors, it would go through him and would be his responsibility. (Tr. 583).

On October 5, 2000, the FAA issued a letter of investigation (LOI) which concerned a review of aircraft logs and the discovery of improper maintenance of damaged smoke detectors. (Tr. 584-85; RX-21). The flights noted were conducted on August 17, 2000, September 2, 2000, September 6, 2000, and September 21, 2000. (RX-

21). He testified the smoke detectors are part of the "STC" to maintain and repair. (Tr. 588). "STC" is supplemental type certification involving the conversion of a passenger plane to a cargo plane. (Tr. 587-88). Mr. Raper responded to the letter of investigation from the FAA. (Tr. 588; RX-22).

The FAA ultimately noted Respondent had "signed off on probes" four different ways and queried the reason for the number of approaches by Respondent. (Tr. 590). As a result of the investigation, Mr. Raper prepared a standard procedures manual draft which was ultimately approved by the FAA for handling of smoke detector deficiencies. (Tr. 590-91). Mr. Raper testified the standard procedures manual for smoke detector maintenance is now followed by Respondent on all probes. (Tr. 591). On October 25, 2000, the FAA responded to Mr. Raper's letter closing the investigation on the smoke detectors and noting that no regulations were violated. (Tr. 592-93; RX-23). As a result of the investigation, no legal enforcement action was taken, however, Mr. Raper noted that the Respondent could have been fined. (Tr. 593).

On cross-examination, Mr. Raper testified he meets with Mr. Spence, the Maintenance Department, the CEO, and the Vice-President of Safety daily at 9:15 a.m. (Tr. 597). He affirmed the results of the smoke detector investigation changed the repair and maintenance procedures for Respondent in handling smoke detector probe deficiencies. (Tr. 599). Before the investigation, there was no standard sign-off procedure. (Tr. 601-02).

III. DISCUSSION

Prefatory to a discussion of the factual scenario presented in this matter, a brief overview of the genesis of AIR21 will provide guidance in formulating the competing evidentiary burdens assigned and the appropriate jurisprudence under which this case should be evaluated.

A. Pertinent Legislative History of AIR21

1. The Early Whistleblower Provisions

The protective provisions of AIR21 were first introduced in 1988 before the 100th Congress. Three separate bills were drafted to provide whistleblower protection for employees of the airline industry. (See 100 H.R. 3812, introduced by Representative James L. Oberstar on December 18, 1987; 100 H.R. 4023, introduced by Rep. Kleczka on February 25, 1988; and 100 H.R. 4113, introduced by Reps. Glickman and Molinari on March 9, 1988). Of the three bills only H.R. 3812 accorded filings with and investigations by the

Federal Aviation Administration (FAA).

Congress specifically rejected the designation of the FAA as the most appropriate agency to handle aviation whistleblower cases. (House Report No. 100-883, 100th Congress, 2d Session, 3, committed on August 12, 1988). The House Committee chose the Secretary of Labor to handle aviation whistleblower complaints because the Department of Labor had "expertise in determining the motivation of an employer in dismissing an employee." (Id.) However, the foregoing bills failed in committee.

In the 104th Congress, Rep. James E. Clyburn introduced 104 H.R. 3187 on March 28, 1996, which also authorized the Secretary of Labor to receive and investigate complaints of discrimination in the aviation industry. Hearings before the Subcommittee on Aviation of the Committee on Transportation and Infrastructure were held on July 10, 1996. Similarly, Senator Kerry also introduced 104 S. 2168 (the Aviation Safety Protection Act of 1996) on September 30, 1996 which provided for filings and investigations of air carrier discrimination by the Secretary of Labor. The Senate bill was referred to the Aviation Subcommittee of the Senate Commerce, Science and Transportation Committee. Both initiatives failed in committee.

The precursor to AIR21 was embodied in bills introduced in the 105th Congress as 105 H.R. 915 (the Aviation Safety Protection Act of 1997) by Reps. Boehlert and Clyburn and 105 S. 100 introduced by Senator Kerry. The House Committee Report No. 105-639 of July 20, 1998, acknowledged that "private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory action by over a dozen federal laws," but that "there are no laws specifically designed to protect airline employee whistleblowers." (H.R. Rep. No. 105-639, 105th Cong., 2d Sess., 51). The provisions of both bills were subsequently modified. The provisions of 105 S. 100 merged into 105 S. 2279 on July 30, 1998. Neither bill survived conference committee. Noteworthy of the language of 105 S. 2279 is the amended Section 519 which ". . . would provide employees of airlines, and employees of airline contractors and subcontractors, with statutory whistleblower protection . . . The language in this Section is similar to whistleblower protection laws that cover employees in other industries, such as **nuclear energy**." (Emphasis added)(105 S. Rpt. No. 105-278, 105th Cong., 2d Sess., 4, 22).

In the 106th Congress, Reps. Boehlert and Clyburn introduced 106 H.R. 953 which, through amendments, resulted in 106 H.R. 1000, the "Wendell H. Ford Aviation Investment and Reform Act for the 21st Century." (106 H.R. Rpt. No. 106-513, 106th Cong., 2d Sess.,

March 8, 2000). Senate bills 106 S. 648 and 106 S. 1139 were incorporated into 106 S. 82 on March 8, 2000. (106 S. Rpt. No. 106-9, 106th Cong., 1st Sess.). Based upon compromise and conference AIR21 emerged from the foregoing bills and became law on April 5, 2000 as Public Law 106-181.

2. The Pertinent Provisions of AIR21

The employee protective provision of AIR21 is set forth at 49 U.S.C.A. § 42121. Subsection (a) proscribes discrimination against airline employees as follows:

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided **to the employer or Federal Government** information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding.

(Emphasis added).

The filing requirements in the complaint procedure of subsection (b) mandate:

> (1) Filing and notification: A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, **not later than 90 days after the date on which such violation occurs**, file (or have **any person** file on his or her behalf) a complaint **with the Secretary of Labor** alleging such discharge or discrimination . . . .

(Emphasis supplied).

The evidentiary or burden of proof requirements of the complaint procedure embodied in subsection (b)(2)(B) demand a showing by Complainant of ". . . a **prima facie** showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a **contributing factor** in the unfavorable personnel action alleged in the complaint." An employer is required to demonstrate **" . . . by clear and convincing evidence**, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." The criteria established for a determination by the Secretary is "that a violation of subsection (a) has occurred **only** if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." (Emphasis added).

B. Applicable Jurisprudence and Standards of Proof

The legislative history of AIR21 supports a conclusion that the decisional law developed under the whistleblower protective provisions of the ERA, as amended in 1992, the Whistleblower Protection Act and environmental statutes provide the framework for litigation arising under AIR21.

AIR21 employee protective provisions are enforced by the Secretary of Labor who has delegated that responsibility to the Occupational Safety and Health Administration (OSHA).[1] It is noted that FAA and OSHA have signed a Memorandum of Understanding "that will result in the two agencies systematically examining

[1] Delegation of Authority and Assignment of Responsibility to the Assistant Secretary For Occupational Health and Safety, 65 Fed. Reg. 50017 (August 16, 2000).

application of OSHA health and safety rules to airline cabin crews."[2] The FAA investigates safety issues whereas OSHA investigates complaints of discriminatory retaliation as a result of protected activity.

The statutory scheme established by AIR21 essentially mirrors the protective provisions of the prevailing nuclear and environmental statutes. The exceptions are that AIR21 provides extraordinary powers to OSHA to order immediate reinstatement of airline employees upon a showing of reasonable cause and places a more stringent "clear and convincing" standard upon an employer in defense of its adverse employment action. Accordingly, the jurisprudence developed by the Secretary of Labor for existing whistleblower statutes will be applied to the instant case.

In post-hearing briefs, the parties agree that the ERA whistleblower statute contains the same burden of proof standards which are included in the AIR21 requirements statute.

The employee protective provision of the ERA, 42 U.S.C. § 5851, was amended by Congress in 1992 "to include a burden-shifting framework distinct from Title VII employment-discrimination burden-shifting framework first established by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-805, 93 S.Ct. 1817 (1973)." Trimmer v. United States Department of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999). Under the ERA and AIR21, during the investigative process, a complainant is required to establish a **prima facie** case that his protected activity is a contributing factor in the unfavorable personnel action alleged in the complaint. It was the intent of Congress to make it easier for whistleblowers to prevail in their discrimination suits, but it was also concerned with stemming frivolous complaints. Trimmer, at 1101, n. 5. "Even if the employee establishes a **prima facie** case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. Thus, only if the employee establishes a **prima facie** case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint." Id.

Once the case proceeds to a formal hearing before the Secretary, the complainant must prove the same elements as in the

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[2] Harry A. Rissetto, et al., The Expansion of OSHA's Jurisdiction In The Airline Industry, October 2000, A.L.I.-A.B.A. Airline and Railroad Labor and Employment Law at 749).

prima facie case, but must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. Trimmer, at 1101-1102; See Dysert v. Secretary of Labor, 105 F.3d 607, 609-610 (11th Cir. 1997)(holding that the complainant's burden is a preponderance of the evidence). Thereafter, and only if complainant meets his burden does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. Trimmer, at 1102.

Accordingly, in an AIR21 "whistleblower" case, Complainant must establish the following to show a **prima facie** case: (1) that the employer is governed by the Act; (2) that he engaged in protected activity as defined by AIR21; (3) that as a result of such activity, he suffered adverse employment action, such as discharge; and (4) that a nexus existed between the protected activity (as a contributing factor) and the adverse action or circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. § 24.5(b)(2)(i)-(iv); Macktal v. U.S. Department of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Zinn v. University of Missouri, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); Overall v. Tennessee Valley Authority, Case No. 1997-ERA-53 @ 12 (ARB Apr. 30, 2001). The foregoing creates an inference of unlawful discrimination. With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation. Id., and cases cited.

In Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, at 1140 (citations omitted).

If Complainant presents a **prima facie** case showing that protected activity was likely a contributing factor in the

unfavorable personnel action, then Respondent has an opportunity to demonstrate by **clear and convincing evidence** that it would have taken the same unfavorable personnel action in the absence of the protected activity. 29 C.F.R. § 24.5(c)(1). In other words, Respondent may avoid liability under AIR21 by producing sufficient evidence that **clearly** and **convincingly** demonstrates a legitimate purpose or motive for the personnel action. See Yule v. Burns Int'l Security Service, Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of **"clear and convincing**," the Secretary and the courts recognize that this evidentiary standard is a higher burden than **preponderance of the evidence** but less than **beyond a reasonable doubt**. See Yule, supra @ 4.

If Respondent meets its burden to produce a legitimate, nondiscriminatory reason for its employment decision, the inference of discrimination is rebutted. Complainant must then assume the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." Overall, @ 13. As the Supreme Court noted in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519, 113 S.Ct. 2742, 2753 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action **permits** rather than compels a finding of intentional discrimination. See also Blow v. City of San Antonio, Texas, 236 F.3d 293, 297 (5th Cir. 2001).

In reviewing the numerous cases on the shifting burden of production and ultimate burden of proof, the U.S. Court of Appeals for the Eighth Circuit in Carroll v. U.S. Department of Labor, 78 F.3d 352, 356 (8th Cir. 1996), aff'g Carroll v. Bechtel Power Corp., Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995), observed:

> But once the employer meets this burden of production, "the presumption raised by the **prima facie** case is rebutted, and the factual inquiry proceeds to a new level of specificity." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. Burdine, 450 U.S. at 253, 256.

Accordingly, the fact a complainant has established a **prima facie** case becomes irrelevant. Rather, the relevant inquiry becomes whether Complainant has proven by a preponderance of the evidence that Respondent retaliated against him or her for engaging

in a protected activity. Carroll, supra at 356.

C. The timeliness of Complainant's Complaint

Upon learning of his discharge on September 29, 2000, Complainant telephonically contacted the OSHA office in Austin, Texas and spoke with Mr. Jerry Kearns, an investigator. Complainant testified that he informed Mr. Kearns of his discharge for reasons he believed were related to his expressed safety concerns while an employee of Respondent.

On October 18, 2000, Complainant completed and filed a formal complaint with the Inspector General of the FAA in which he complained of his discriminatory discharge for raising safety concerns with Respondent and the FAA. (ALJX-1e).

The parties stipulated that on December 7, 2000, OSHA received a file from Department of Transportation through the FAA. The file was referred to OSHA Investigator Anthony Incristi on or about December 11, 2000. The investigator considered the documents filed with the FAA as Complainant's complaint to the Secretary of Labor as filed "by reference" on October 18, 2000. The parties further stipulated that investigator Incristi did not receive any files or communications from Mr. Kearns that "initiated or played a role" in his investigation. No other information or complaints regarding Complainant's claim were received other than the filing with the FAA. (JX-1).

Complainant contends that his complaint was timely filed on October 18, 2000, within 90 days of his discharge, pursuant to Section 42121(b)(1)(a) of AIR21 when the FAA Inspector General "turned Captain Taylor's complaint over to OSHA on or about December 7, 2000." Complainant argues that "any person" may file a complaint on behalf of an employee which is essentially what occurred when the Inspector General "turned over" to OSHA the complaint on behalf of Complainant.

Respondent argues that Complainant himself never filed a complaint with the Secretary of Labor. Respondent further contends that Complainant's filing with the FAA is not an effective filing with the Secretary since AIR21 requires Complainant to file a complaint with the Secretary of Labor. Moreover, Respondent argues the term "person" is not defined in AIR21 and the appropriate rules of statutory construction apply which excludes the Administrator of the FAA since "person" by definition is "a human being (i.e. natural person) though by statute [the] term may include [other

entities]."[3] Lastly, Respondent notes that Congress specifically considered and rejected the filing of a discrimination complaint with the FAA.

Contrary to Respondent's position, AIR21 incorporates the definition section at 49 U.S.C. § 40102 and supplements it with its section 4 which defines only "Administrator" and "Secretary." The term "person," in addition to its meaning under section 1 of Title 1, "includes a **governmental authority** and a trustee, receiver, assignee, and other similar representative." 49 U.S.C. § 40102(a)(33). Title 1 U.S.C. § 1 defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Thus, "governmental authority," which is absent from Title 1, was specifically added to Air Commerce and Safety legislation, but is not otherwise defined.

The term "governmental" means "of, pertaining to, or proceeding from government." BLACK'S LAW DICTIONARY 695 (6th Ed. 1990). "Authority" is defined as "Permission. Right to exercise powers; to implement and enforce laws; to exact obedience; to command; to judge. Control over; jurisdiction. Often synonymous with power . . ." BLACK'S LAW DICTIONARY 133 (6th Ed. 1990). Thus, I find and conclude, based on common usage and understanding, that "governmental authority" includes the activities and powers of the Administrator of the FAA, who I conclude is a person within the meaning of AIR 21.

Based on the stipulation of the parties, I find that Mr. Kearns of OSHA did not consider Complainant's telephone call "as the filing of a complaint" under AIR 21 and did not process the call as a complaint or forward any information to Investigator Incristi or any OSHA office for investigation. His failure to do so is unexplained in the record.

I find, however, that Complainant's filing with the Inspector General of the FAA was sufficient to toll the 90-day time limit for filing a discrimination complaint under AIR 21. Even though the filing was lodged with the wrong agency, the complaint raised the statutory claim in issue, i.e. that he was fired from employment with Respondent for reporting matters of FAA compliance and safety. Moreover, complainants who file complaints without the assistance of legal counsel are afforded broad latitude in framing contents of their complaints. Immanuel v. Wyoming Concrete Industries, Inc., Case No. 1995-WPC-3 (ARB May 28, 1997) (a letter filing with a

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[3] BLACK'S LAW DICTIONARY 1142 (6th Edition 1990).

state environmental agency deemed constructively timely). The instant filing was timely notwithstanding Respondent's argument that it was not notified of the filing or the investigation was not pursued in a timely fashion. See Sawyers v. Baldwin Union Free School District, Case No. 1985-TSC-1 @ 2 (Sec'y Oct. 5, 1988).

The Secretary has uniformly held that equitable tolling of the statutorily imposed time period for filing a complaint under the ERA is possible only if (1) the complainant was misled by the employer, (2) the complainant was prevented in some extraordinary way from asserting his rights, or (3) the complainant timely filed the precise statutory claim in the wrong forum. See Bonanno v. Northeast Nuclear Energy Co., Case Nos. 1992-ERA-40 and 1992-ERA-41 (Sec'y Aug. 25, 1993). The Secretary has recognized and applied equitable tolling of time limits for complaint filings in the wrong forum under environmental protective statutes. Sawyers, supra; see also Immanuel, supra.

Accordingly, I find and conclude that Complainant timely filed his complaint on October 18, 2000, when he raised the precise statutory issue with the Inspector General of the FAA, who subsequently referred the complaint to OSHA on or about December 7, 2000, within the 90-day filing period after Complainant's termination on September 25, 2000.

D. Protected Activity

As noted above, the first requisite element in establishing a **prima facie** case is a showing of protected activity. In ERA cases, the courts limit protected activity to reports of an act which implicates safety definitively and specifically. See American Nuclear Resources v. U.S. Department of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998) citing Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995). However, an employee's complaints may constitute "reasonably perceived violations" of the environmental acts. Johnson v. Old Dominion Security, Case Nos. 1986-CAA-3, 1986-CAA-4 and 1986-CAA-5 (Sec'y May 29, 1991); see also Crosby v. Hughes Aircraft Co., Case No. 1985-TSC-2 @ 14 (Sec'y Aug. 17, 1993).

Internal complaints made to company supervisors concerning safety and quality control are protected activities under the ERA. Bassett v. Niagara Mohawk Power Corp., Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993). I note, however, that the U.S. Court of Appeals for the Fifth Circuit, within whose jurisdiction this matter arises, has repeatedly held that internal complaints are not protected activity within the context of the Energy Reorganization Act. See Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir.

1984); Macktal v. U.S. Department of Labor, 171 F.3d 323 (5th Cir. 1999).

I take notice, however, that the current Fifth Circuit jurisprudence with respect to internal complaints is based on disputes raised before the passage of the 1992 Amendments to the ERA. Specifically, Macktal, the most recent Fifth Circuit case to address the internal complaint issue, centers on an ERA discrimination claim filed in 1986. Macktal, supra at 326. The 1992 Amendments to the ERA provide that an employee's "notifi[cation to] his employer of an alleged violation of [the ERA]" is a prohibited basis for discrimination. See 42 U.S.C. § 5851(a)(1)(A). The Administrative Review Board (herein Board) and the remaining Federal Circuit Courts have repeatedly held that internal complaints constitute protected activity under the ERA. See Hermanson v. Morrison Knudsen Corp., Case No. 1994-CER-2 (ARB June 28, 1996); Dysert v. Westinghouse Electric Corp., Case No. 1986-ERA-39 (Sec'y Oct. 30, 1991); Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir. 1984); Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986); Passaic Valley Sewerage v. U.S. Department of Labor, 992 F.2d 474, 481 (3d Cir. 1993).

AIR21 specifically legislated that complaints made to the employer as well as the Federal Government constitute protected activity. Accordingly, I will follow current Board case law, prevailing Federal Circuit Court jurisprudence, the 1992 Amendments to the ERA and conclude that internal complaints are protected activity as articulated under AIR21. Furthermore, I note that the form of the complaint is not critical and even an informal complaint to a supervisor may be sufficient to establish protected activity. Samodurov v. General Physic Corp., Case No. 1989-ERA-20 (Sec'y Nov. 16, 1993).

1. Pre-AIR21 Activity

In the instant matter, the following five incidents involve complaints lodged by Complainant before the passage of AIR21 on April 5, 2000.

a. The Robert Mailer Incident

On May 12, 1999, one year and four months before his discharge, Complainant voiced concerns over the conduct of Mr. Mailer attempting to overload an aircraft at the U.S.P.S. hub in Indianapolis. He asked Mailer to redistribute the weight in the aircraft and refused to fly the aircraft until the redistribution occurred. He acknowledged the problem was corrected before he

actually flew the aircraft. He further admitted Captain Phillips wrote a letter to the subcontractor who employed Mailer and voiced concern about Complainant's report. (ALJX-5).

Although Complainant testified he never heard anything about the matter from the subcontractor, Captain Phillips reported he received a telephone call from Mailer's supervisor and that Mailer had been properly instructed concerning overweight and balance problems. Captain Phillips stated Complainant's complaint was legitimate.

As this incident involves the weight of cargo placed on an aircraft, it is a legitimate safety concern. I find Complainant's complaint arguably constitutes protected activity in the absence of statutory foundation. However, Complainant has failed to establish any adverse action taken by Respondent about the Mailer incident within temporal proximity to the activity. As noted above, Respondent agreed with Complainant's concerns and, indeed, wrote two letters to Mailer's supervisors regarding his conduct. The record reveals that Complainant received no discipline or threat of discipline from Respondent for his expressed complaint. Accordingly, I find Complainant has failed to demonstrate any discriminatory animus or hostility by Respondent toward Complainant in this incident.

b. The Truby Incident

On August 12, 1999, one year and one month prior to his termination, Complainant expressed concern over a confrontation with Tom Truby, a contract employee at Respondent's Indianapolis U.S.P.S. facility. This incident also involved an overweight problem of cargo not being properly distributed. Complainant verbally reported his concern to Captain Spence and was thereafter taken off flight status with pay and told to report to a meeting in Dallas with Spence and Truby. Complainant acknowledged the problem was corrected before he flew the aircraft. Truby refused to attend the meeting, which never occurred.

With regard to the Truby incident, Captain Spence confirmed Complainant did the right thing in complaining about weight supports and testified the incident played no role in his decision to terminate Complainant. As a result of Truby's failure to attend the meeting, Captain Phillips further reported he disregarded Truby's complaints concerning Complainant.

Since this incident also involved the weight/balancing of cargo placed in an aircraft, it is a legitimate safety concern. I find Complainant's complaint arguably was protected activity but

for no statutory basis. However, Complainant has again failed to establish any temporal adverse action taken by Respondent with respect to the Truby incident. As noted above, Respondent agreed with Complainant's concerns and disregarded Truby's comments concerning Complainant. Although he was taken off flight status while this matter was being investigated, he continued to receive his usual pay. Complainant received no discipline nor was he threatened with discipline for his complaints. Accordingly, Complainant has failed to demonstrate any animus-provoked discrimination by Respondent in this incident.

c. The Geiselhart Incidents

On August 12, 1999, one year and one month before his discharge, and in November 1999, Complainant expressed concern over incidents involving Lynn Geiselhart, a check airman as noted above. Complainant verbally reported to Captain Spence that Geiselhart was "totally unprofessional and unsafe" during a series of flights while instructing a new flight engineer. Geiselhart admitted he was taking codeine, he did not check his oxygen mask and did not fasten his safety belt during take-off, landing or taxi and read a newspaper and passed the paper to other crewmembers. Complainant requested that Geiselhart be taken off any future assignments with him. He was not sure whether he asked Geiselhart to respond to a checklist prior to a flight. He did not confer with Geiselhart in flight, but rather phoned Captain Spence after the flight. He confirmed he did not "hold" the flight because of Geiselhart's failure to use a seat belt. Complainant testified he was taken off flight status and told to report to Dallas for a meeting concerning the events surrounding his complaint about Geiselhart.

Captain Spence indicated this was a "PIC" or pilot-in-command issue. Captain Spence counseled with Complainant about "CRM" to facilitate crew members working together and emphasized Complainant's need to raise issues and communicate to improve his CRM, but provided no discipline for the incident. (See ALJX-1(d), p. 3). Captain Spence indicated he informed all involved in the incident to improve their CRM as well. He confirmed Geiselhart's status as line check airman was rescinded for a period of time because of the incidents and stated Complainant was cooperative, but did not share any blame for the incident. Captain Spence testified the incident involving Geiselhart did not play a role in his decision to terminate Complainant. According to Captain Spence, Complainant, as the pilot-in-command had control over an instructor on his aircraft, such as Geiselhart, and contrary to Complainant's opinion, Geiselhart's conduct was a matter within his control.

Since this incident, which involves the conduct of a flight instructor in the cockpit, is a legitimate safety concern, I find Complainant's complaint is arguably protected activity. However, Complainant has again failed to establish any temporal adverse action taken by Respondent with respect to the Geiselhart incidents. As noted above, Captain Spence did not discipline Complainant, but counseled him about his CRM. Although taken off flight status to attend the meeting, Complainant was paid his usual salary. Captain Spence credibly reported that the Captain is pilot-in-command of his aircraft and has control over those individuals in the aircraft. Accordingly, Complainant, despite his testimony to the contrary, had control over Geiselhart's behavior. By his own admission, Complainant did not confer with Geiselhart over his behavior during the flight, and did not refuse to hold the flight when Geiselhart would not fasten his seat belt. I agree with Captain Spence and find this incident attests to Complainant's lack of effective CRM. Therefore, Complainant has failed to demonstrate any animus-generated discrimination by Respondent relating to this incident.

d. Unit Loading Devices (ULDs) Incident

On January 1, 2000, Complainant reported the loading of ULDs onto an aircraft in Indianapolis with snow packed on top of the cans. He believed the snow on the ULDs could melt and cause water to seep into the plane's electrical system and cause a safety concern. He talked to Melvin Starks, who is in charge of cargo-handling for Respondent, and the problem was resolved when the cargo loaders removed the snow from the ULDs. He was not taken off flight status as a result of this safety concern. He acknowledged the incident did not involve anything broken or needing repair, but he entered the incident in the maintenance log book of the aircraft. (ALJX-5).

Captain Spence agreed with Complainant's assessment and complaint about snow on the ULDs being loaded into the aircraft. He testified Complainant handled the ULD incident properly and the ULD incident did not play a role in his decision to terminate Complainant.

This incident, which involves the possible loss of electrical power of an aircraft in flight, is also a legitimate safety concern, therefore I find Complainant's complaint arguably to be protected activity. However, Complainant has again failed to establish any adverse action taken by Respondent with respect to the ULD incident. As noted above, Respondent agreed with Complainant's complaint and assessment regarding the possible loading of ULDs covered with snow onto an aircraft. Complainant

himself acknowledged he was not taken off flight status and the matter was resolved at the time of the incident. Accordingly, Complainant has failed to demonstrate any animus or discrimination by Respondent toward Complainant in this incident.

e. The "Tail Skid" Incident

On March 8, 2000, Complainant reported a tail skid warning light was received after take-off, which caused the aircraft to be landed. He recorded the incident in the maintenance log book. After landing, Complainant stated Dr. Neil Johnson, Director of Safety for Respondent, approached him and asked what happened. Complainant responded he wrote-up the incident in the log after noting a tail skid light and returned to the site. Dr. Johnson responded, "do you want to tell me what really happened?" He testified that he did not ignore Johnson and when asked by Johnson what happened after take-off, he responded "nothing." He informed Johnson that he was accusing Complainant of something he knew nothing about. Complainant stated he had written the incident up in the log book, which he believed was sufficient, and it was now his task to get the express mail to Los Angeles as soon as possible. (ALJX-5).

Complainant informed Dr. Johnson that if the priority is an investigation, then "let's go get a cup of coffee, sit down and discuss the incident." Dr. Johnson responded, "if you don't answer my questions, the plane is not going anywhere." Complainant answered, "I'm the pilot in command of this aircraft and I believe it's under my control and my superiors have told me to take this airplane with the express mail to Los Angeles . . ."

Dr. Johnson testified he went to the site and attempted to talk to Complainant who was preparing to depart in another aircraft. He asked Complainant about the tail skid to which Complainant responded, "nothing happened." Dr. Johnson informed Complainant that he was Director of Safety and tried to ascertain the facts of the incident. He testified Complainant responded, "Now, you're accusing me of something that you don't know nothing about." Complainant further stated he was a Captain with 18,000 flight hours and that he was going to call his attorney. Dr. Johnson denied Complainant ever said, "let's leave the cockpit and go to a building to talk about the tail skid incident."

Dr. Johnson testified Complainant's response did not exhibit good "CRM" and reflected a "total lack of professionalism," as he was belligerent, loud and dismissed Dr. Johnson by turning his back and began doing other things. Dr. Johnson acknowledged he did not look at the aircraft maintenance log to determine whether any

entries regarding the tail skid had been entered.

Dr. Johnson never fully developed the facts relating to the tail skid incident and could not determine if a tail strike actually occurred. Dr. Johnson testified he and Complainant were called to Dallas, Texas for a meeting with Captain Spence, who counseled Complainant on timely reporting and communications during the meeting. He testified Complainant exhibited an attitude that he is above being questioned and "CRM" was designed to fix Complainant's "anti-authority" attitude.

On March 14, 2000, Captain Spence held a meeting with Complainant about the tail skid incident. He acknowledged that Complainant was removed from flight status for purposes of this meeting, but was paid for the time he missed from any flight schedules.

Captain Spence noted there was a difference of opinion between Neil Johnson and Complainant. He had to facilitate the meeting, which was also attended by First Officer Morbitt and Second Officer Art Sager. Captain Spence testified the tail skid incident and the meeting with Complainant and others in attendance did not play a role in his decision to terminate Complainant. The investigation of the tail skid incident revealed the skid had broken, but it could not be determined if the skid was broken during take-off, landing or in maneuvering. The concern expressed by Captain Spence was not the tail skid event, but the manner in which Complainant interfaced with Dr. Johnson during the incident.

Captain Spence stated Complainant did not effectively communicate on the tail skid issue, however, he reported Complainant was not in jeopardy of discipline at the March 14, 2000 meeting regarding the tail skid.

Since this incident originated with the activation of the tail skid warning light illuminating in flight, Complainant's air turn-back was a legitimate safety concern. However, Complainant has again failed to establish any adverse action temporally taken by Respondent with respect to this incident. Initially, I note that although Complainant was taken off flight status when he was called to Dallas for a meeting with Captain Spence regarding this matter, he was paid during that time. Furthermore, as noted above, Captain Spence exhaustively explained that Complainant's lack of CRM again necessitated another counseling session. It was Complainant's attitude and interface with Dr. Johnson which Captain Spence sought to correct by facilitating the meeting and again counseling with Complainant. Accordingly, Complainant has failed to demonstrate any animus or discrimination by Respondent in this incident.

On March 13, 2000, Complainant wrote a letter[4] to the FAA outlining the five incidents listed above. (CX-4). He stated the letter was "being written as a last resort attempt to seek assistance in addressing a series of safety and legal issues at [Respondent]." Complainant continued "under the direction of Captain Bud Phillips, Chief Operating Officer, EOI Administrators have been:

> 1. Unresponsive to matters of Federal Aviation Regulations compliance and safety.
> 2. Harassing and threatening me economically for raising specific legal and safety issues.
> 3. Suggesting command decisions that involve disregarding legal and safety considerations."

Complainant also asserted "since August 10, 1999, as a **direct result** of my reporting safety concerns and/or mechanical failures of an aircraft:

> I have been requested to meet with EOI Flight Operations representatives at the Dallas headquarters three times to be reprimanded.
>
> On two occasions I have been removed from flying scheduled trips and taken off flight status.
>
> Was threatened that if I could not "perform" the duties of an EOI Captain, then it could be "arranged" for me to be demoted to First Officer.
>
> Was advised that if I continued to raise these safety issues it could mean that EOI would lose their contract with the U.S. Postal Service."

Although Complainant maintained he was discriminated against as noted above for his reporting of safety concerns and/or the mechanical failures of an aircraft, he provides no evidence in the instant record of any adverse action taken by Respondent against him. Specifically, when Complainant was called to Dallas and taken off flight status, he received his ordinary pay. Moreover, he requested the FAA to hold these matters "in confidence" until he could "sort this matter out." Interestingly, Complainant did not file any more complaints with any government entity until after his

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[4] This letter is addressed to "Whom It May Concern," however, the facsimile cover page is addressed to Mike Mills of the FAA. (CX-4).

discharge by Respondent. Furthermore, Complainant provides no record evidence of any "reprimands," threats of demotion or loss of income. He failed to attribute any statements to any Respondent official that if he continued to raise safety issues, Respondent could lose its contract with the U.S. Postal Service.

Moreover, I find Respondent's response to the five incidents discussed above was clearly not "unresponsive," but pro-active. Complainant produced no evidence in this record that any official of Respondent "suggested" command decisions to disregard legal and safety considerations. It is further noted that less than one month after the March 13, 2001 letter to the FAA, AIR21 became law, but Complainant failed to file any formal complaints about Respondent's alleged discrimination or retaliation which was the subject of his March 13, 2001 letter until after his September 2000 termination. Accordingly, I find and conclude that Complainant's pre-AIR21 assertions of retaliation in his March 13, 2000 letter to the FAA lack evidentiary support and are devoid of merit.

2. Post-AIR21 Activity

As noted above, AIR21 became law on April 5, 2000. After this date, Complainant lodged three more complaints. Consideration of these complaints follows below.

a. Air Turn-backs

Complainant testified that the three air turn-backs, which occurred in his last week of employment, were not raised as concerns until after his termination and he is not contending that anything was improper about the air turn-backs. (Tr. 300-01). He acknowledged the September 18, 2000 diversion to Alexandria, Louisiana, from Indianapolis was discussed with Captain Spence who encouraged him to go to Alexandria, Louisiana. He was not pulled off flight status because of this diversion. A second air turn-back involving oil temperature on or about September 20, 2000, occurred with the concurrence of Respondent and Complainant was not told not to turn back. The third diversion, involving a compressor problem on or about September 21, 2000, occurred as a result of Complainant conferring with the company and being told to divert the aircraft.

During oral arguments, Complainant asserted that his repeated safety concerns, which resulted in air turn-backs, was costing Respondent revenue. Therefore, Complainant argued, Respondent, in its frustration with Complainant's actions, decided to terminate Respondent. The record does not support a factual conclusion that Respondent was frustrated about air turn-backs based on

Complainant's pilot judgment. In fact, this allegation was specifically and credibly denied by Captain Spence. Turn-backs were viewed as a part of the daily business of Respondent.

As the air turn-backs involve matters of safety, I find Complainant's complaints resulting in air turn-backs were protected activity under AIR21. However, I find Complainant's argument is unsupported by the instant record. Complainant himself testified there was nothing improper about the air turn-backs and Respondent acknowledged Complainant's actions were proper. Accordingly, I find Complainant's argument that he was discriminated against due to his air turn-backs is devoid of merit notwithstanding the temporal proximity to his discharge.

b. Tail Stand Incident

As noted above, on September 18, 2000, Complainant piloted an aircraft from Laredo, Texas, to Indianapolis, Indiana, and upon arrival, determined that a tail stand was still attached to the aircraft. Complainant noted in the aircraft maintenance log book that the tail stand was found in place, and after review, it was determined by maintenance personnel that there was no damage to the aircraft or the tail stand. The log book entry was faxed to Respondent upon arrival at Indianapolis, Indiana.

Flight engineer Nichol reported he observed the tail stand, but answered in the pre-flight checklist that the tail stand had been stowed. Complainant verbally reprimanded Nichol and Burleigh because of the "seriousness" of the incident. In view of the seriousness of the event and despite two occasions to communicate the incident on September 18, 2000, Complainant failed to verbally report the event to Captain Spence.

On September 19, 2000, Captain Spence telephoned Complainant and asked about the tail stand incident. He informed Complainant that he had seen the log book entry which indicated he had flown with the tail stand attached to which Complainant responded, "it must be what we did." Captain Spence requested that Complainant prepare a written report. Captain Spence believed this conversation revealed that Complainant was not being forthright with him and was being evasive concerning the tail stand incident. Complainant testified he had, in fact, prepared a report as of September 18, 2000, but did not fax the report until September 20, 2000, when he arrived at his home. Captain Spence acknowledged Complainant faxed an incident report on September 20, 2000. In a prepared statement provided to the Department of Labor during the investigation of this matter Complainant inconsistently reported he actually wrote the incident report on September 20, 2000.

Complainant testified the investigation into the tail stand incident was considered timely by the FAA which concluded the commander of the aircraft was responsible for the negligent acts of the crew. Captain Spence acknowledged a pilot must rely upon his crew to do their job and verify the status of items on the checklist. He further acknowledged the flight engineer on this particular flight did not do his job of stowing the tail stand and verifying the tail stand was still attached to the aircraft.

Captain Spence testified he should not have had to discover the details associated with the tail stand incident and expects more than minimal information from a Captain employed by Respondent. Captain Spence wanted pilots to telephone him on unusual occurrences because he wanted to know and expected a written report that day or that night by facsimile. He considered "timely" to be as soon after the incident as possible, right after landing the aircraft. Within the operations bulletin, an incident report of unusual occurrences, which I find and conclude existed here, is required "immediately." He stated a pilot should not wait two days to prepare an incident report on an unusual occurrence.

Captain Spence acknowledged that as part of the FAA investigation into Complainant's termination, he stated that the tail stand incident was the "last straw." He testified the comment did not involve safety issues. He emphasized that the safety issues and concerns raised by Complainant played no role in his decision to terminate Complainant. He explained the failure to timely report the tail stand incident was the "final straw" of actions and inactions by Complainant.

Captain Spence decided to terminate Complainant because he did not receive a timely report on the tail stand and because of Complainant's confrontational issues with his crew and others. Of the inactions by Complainant was his opportunities to inform Captain Spence of the tail stand incident which he did not do in a timely manner. Captain Spence testified the aircraft log book entry was not enough nor was the incident report. He expected more of Complainant because of his experience. Captain Spence further testified he decided to terminate Complainant because he believed that their relationship was regressing. Moreover, Captain Spence felt Complainant was "incommunicado" during the time after the tail stand incident. Captain Spence thought their relationship was going backward and not forward, and he did more counseling with Complainant than any other pilot employed by Respondent.

Captain Spence confirmed First Officer Burleigh and Flight Engineer Nichol were subsequently suspended for two weeks without pay for their participation in the tail stand incident.

The tail stand incident was never the subject of a safety complaint and only involved a matter of safety because of Complainant and his crew's negligence. Accordingly, Complainant's conduct in handling this incident does not constitute protected activity. Rather, the incident centers around Complainant's inability to communicate mistakes made by his crew for which he is ultimately responsible to Respondent. Respondent consistently and credibly reported that unusual occurrences, such as leaving a tail stand attached to an aircraft during flight, must be immediately reported when discovered. The record indicates that Complainant did not report the incident to Respondent, even after talking to his supervisor on two occasions the same day of the incident. Moreover, when he was confronted about the incident, I find that Complainant was not forthcoming regarding the facts. Complainant admitted reprimanding and/or counseling with the First Officer and Flight Engineer about their negligence in performing their duties because of the "seriousness" of the tail stand incident. He did not accord Respondent or Captain Spence the same opportunity to be informed of such an unusual occurrence.

Indeed, Complainant was cleared of legal responsibility for the incident by the FAA, but Complainant, as the Captain of an aircraft, is still deemed to be the pilot-in-command of his aircraft and is responsible for the errors of his crew. Accordingly, Complainant was the responsible party for the tail stand remaining attached to the aircraft and was required to immediately report the "unusual occurrence" to Respondent pursuant to company policy when it was discovered immediately after the flight. As Captain Spence consistently testified and I find, Complainant failed to timely report the incident to Respondent. The determination of the FAA that the incident was raised "timely" can not substitute for Respondent's policies or decisions.

Respondent further points out that Complainant has a history of requiring counseling regarding his communication and confrontations with Respondent, his crew and others. I note that the record reflects incidents involving Complainant's inability to communicate with his crew and resolve problems without a confrontation. Accordingly, I find that Respondent has demonstrated clear and convincing evidence of a legitimate business reason to terminate Complainant, namely Complainant's inability to adequately communicate and interface with his crew and management officials, to effect CRM and his confrontational attitude with others, including management.

c. Smoke Detector Probe Incidents

Smoke detector probe problems were reported by Complainant on

August 17, 2000, September 2, 2000, September 6, 2000, and September 21, 2000 in the maintenance log books, which became matters of investigation by the FAA. He noted that the smoke detector probes, of which there are approximately 12 to 14 probes in the fuselage of the aircraft for smoke detection during flight, were broken, bent or missing in the cargo area. The smoke detector probes were critical to flight safety according to Complainant. Complainant further testified the Federal Aviation Regulations required that safety issues be reported and entered into the aircraft log book.

On September 20, 2000, Complainant was assigned a flight from Austin, Texas to Mexico. He described the smoke detector problem, which he wrote up in the log book, as the probes being "flush with the wall" whereas the probes should be extended one inch beyond the wall. On this occasion, Complainant telephoned Captain Spence at home to report that the "maintenance fix" was to attach a plastic band on the probes, about which he expressed concern. Captain Spence spoke with maintenance and later telephoned Complainant to report that the plastic band fix was appropriate.

On October 5, 2000, the FAA communicated with Bobby Raper of Respondent, concerning their findings about the smoke detector problems. Complainant acknowledged he filed his complaints with the FAA over the smoke detector probe problems after his termination and he was not pulled off flight status for writing up smoke detectors, nor was he called into the office to discuss those problems. (ALJX-5, dated October 3, 2000).

Captain Spence received one telephone call from Complainant about smoke detector probes. He recalled telephoning maintenance, who informed him that the detectors were being repaired in the manner stated in the maintenance manual. He then informed Complainant that the maintenance fix was proper. Captain Spence testified Complainant's complaints about the smoke detector probes played no role in his decision to terminate Complainant. He further stated complaints made by Complainant to the FAA did not play a role in his decision to terminate Complainant.

Mr. Raper noted that the FAA ultimately decided Respondent had "signed off on probes" four different ways and queried the reason for the number of approaches by Respondent. As a result of the investigation, Mr. Raper prepared a standard procedures manual draft which was ultimately approved by the FAA for the handling of smoke detector deficiencies. Mr. Raper testified the standard procedures manual for smoke detector maintenance is now followed by Respondent on all probes. On October 25, 2000, the FAA responded to Mr. Raper's letter closing the investigation on the smoke

detectors and noting that no violations of regulations were involved. As a result of the investigation, no legal enforcement action was taken.

As the smoke detector probe incidents involved matters of safety, I find that Complainant's complaints constituted protected activity under AIR21. However, I find Complainant's allegations of discrimination emanating therefrom are unfounded based on the instant record. Complainant himself testified he was not pulled off flight status for writing-up smoke detectors, nor was he called into the office to discuss those problems. Moreover, Respondent credibly testified Complainant's report of the smoke detector probe incidents did not play a role in its decision to terminate Complainant. Accordingly, I find Complainant's argument that he was discriminated against due to the smoke detector probe incidents is devoid of merit.

Based on the foregoing, I find Complainant has not established that Respondent terminated him based on his protected activities. Moreover, I note only the air turn-backs, the tail stand incident and the smoke detector probe incidents are proximate in time to Complainant's alleged discrimination. As noted above, the tail stand incident was not a protected activity. The air turn-backs and smoke detector probe incidents were protected activity, however, Complainant was not able to establish any animus or hostility of Respondent or any discriminatory action taken against him by Respondent. Indeed, Respondent agreed with Complainant's actions in these matters.

With respect to the tail stand incident, Respondent established with clear and convincing evidence that Complainant has a history of communication problems with his crew and Respondent and confrontations with others, and therefore, Complainant's termination was the result of these communications deficiencies and not his reporting of safety issues, i.e., his protected activity. Moreover, Complainant did not make any safety complaints to the FAA during the time period of these three incidents.

E. Complainant's Activity was not a Contributing Factor in his Termination

As noted above, I find and conclude that the five pre-AIR21 incidents are too remote in time to warrant a conclusion that Respondent's termination decision was inspired by such activity.

Two of the three incidents occurring post-AIR21 constitute protected activity, i.e., the complaints about smoke detector probes and the three air diversions/turn-backs because of

mechanical problems. I find Complainant has not demonstrated that his post-AIR21 protected activity was a "contributing factor" in the unfavorable personnel action of his discharge. I find that he has not presented any direct evidence that either incident was a contributing factor, but instead relies upon circumstantial evidence and the temporal proximity of the incidents to his termination. Thus, he argues that his discharge followed so closely in time to his protected activity that an inference of discriminatory motive is justified.

He further argues that a causative nexus is buttressed by additional circumstantial evidence indicative of discriminatory motive in the context of a pretext analysis, such as a "high work performance rating prior to his discharge," the manner in which he was informed of his termination shortly after he engaged in protected activity, the magnitude of the offense, Respondent's failure to follow its normal procedure and conduct an adequate investigation, and the application of disparate treatment vis-a-vis "similarly situated employees." I am not persuaded that the foregoing factors, individually or collectively, enhance Complainant's case.

Certainly, temporal proximity may be sufficient to raise an inference of causation in a whistleblower case. Tracanna v. Arctic Slope Inspection Service, Case No. 1997-WPC-1 @ 8 (ARB July 31, 2001). As the Board recognized in Tracanna, "where protected activity and adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised." Here, Complainant's failure to adequately and timely communicate an unusual occurrence, i.e., the tail stand incident, constitutes an intervening cause since it occurred in the midst of complaints about smoke detector probes and mechanical problems resulting in air diversions/turn-backs. Since the intervening inadequate and untimely communication regarding the tail stand incident could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the protected activity and the adverse action. Id. In the absence of any expressed animus or hostility and the concurrence of Respondent in Complainant's judgment as a pilot in diversions and air turn-backs, I conclude that no other evidence has been proffered to establish a link between the protected activity and adverse action despite the intervening event. Thus, I find Complainant's timing argument unpersuasive.

It is undisputed that Complainant was a good "stick and rudder" pilot and did "very good" on simulator proficiency checks. Aside from prior counseling sessions by Captain Spence regarding his communication shortcomings, CRM deficiencies and

confrontational attitude as noted above, the record reveals no prior complaints about his job performance. Captain Spence asserted he had to counsel with Complainant over communicative issues more than any other pilot. Being a good "stick and rudder" pilot is obviously the technical aspect of his job performance. Simultaneously, his management and communication skills were not at the level expected by Respondent. His overall job function involved technical, managerial and communicative skills. One aspect of performance does not diminish the importance or Respondent's expectations of the others. I find no pretext created by Complainant's selection for discharge notwithstanding his "high" technical job performance.

Complainant suggests that pretext is shown by the manner in which his termination was communicated. Although Respondent could have approached its decisional process in a different manner and could have summoned Complainant for an exit interview, failure to do so does not establish discriminatory motive.

I find that after the tail stand incident, Complainant was not "incommunicado" as asserted by Captain Spence. Complainant was telephonically contacted by scheduling on September 20 and 21, 2000, for flights which he was assigned. He maintained a company cellular phone at all times for purposes of communication, but Captain Spence did not call Complainant.

However, Captain Spence's failure to convene a meeting with Complainant and his crew to discuss the failure to communicate or call him on his cellular phone or raise his termination during a discussion of smoke detector probes on September 20, 2000, do not evince pretext or a causative nexus to his protected activity.

Complainant submits that Respondent's failure to follow its own personnel procedure is evidence of discriminatory motive. The record reveals that Mr. Thompkins characterized Complainant's discharge as "at will" rather than "for cause." The former was considered more compassionate since severance pay and unemployment benefits were extended. Mr. Thompkins agreed Respondent had cause to discharge Complainant but instead classified the separation as "at will." No record evidence manifests a direct finding or inference that Mr. Thompkins' actions constitute a prohibitive motive and I so find.

Complainant argues the "magnitude of the offense" demonstrates an illicit motive. He posits whether Captain Spence "really terminate[d] [Complainant] for flying that leg with the tail stand on?" He agrees flying with an installed tail stand is an unusual

occurrence. Respondent did not terminate Complainant because the tail stand incident happened, but because he failed to report the incident to Captain Spence in an adequate and timely manner. Complainant argues his failure to notify Captain Spence about the tail stand incident is not enough to justify his termination. Complainant's description of this unusual occurrence as a "non-incident" clearly shows his misperception of what needed to be done in reporting such an event immediately. As Respondent notes this was the "non-stick and rudder" requirement of the Captain position that Complainant could not meet. The "magnitude" of the offense is Complainant's failure to understand what was needed or requested by Respondent in the form of information and reports and to comply with such demands.

Complainant alleges that Dr. Johnson's failure to consult the aircraft maintenance log book entries before launching into his investigation of the tail skid incident and "jump[ing] to conclusions" is another factor in determining motive. That the inquiry could have been handled differently by "following the usual doctrine of going right to the beginning" is no reason to ascribe discriminatory motive to a discharge which occurred six months later in the absence of any other evidence of animus or hostility. I so find.

Lastly, Complainant avers that he was treated differently than other crew members, whose inactions resulted in the tail stand incident, which demonstrates discriminatory motive. The record manifests a finding that Complainant received greater discipline than his two subordinate crew members and that they were not similarly situated as employees of Respondent. The application of disparate treatment in whistleblower cases requires a showing that employees with whom Complainant seeks to compare himself are "similarly situated" to evince a suggestion of retaliation from different treatment. See Tracanna, supra @ 9. This record does not support Complainant's contention.

As a Captain, Complainant held a more responsible position with greater duties and authority than his subordinate First Officer and Flight Engineer, thus they held different jobs. His subordinates reported to Complainant whereas he reported to the Chief Pilot. Moreover, an employee's work and disciplinary history must also be comparatively considered. Complainant had been counseled by Captain Spence on several occasions about his CRM and communicative skills and confrontational attitude. In comparison, the record only shows Complainant's reprimand and counseling of his First Officer and Flight Engineer over their inactions regarding the tail stand incident. The crew members also suffered discipline, a two-week suspension, because of their part in

allowing the tail stand incident to occur, whereas Complainant's termination was for failing to adequately and timely communicate the incident. Thus, they were disciplined for different actions or inactions, from which I draw no prohibitive motive. For the above reasons, I find Complainant was not disparately treated from his crew members in such a manner as to create a finding of pretext.

In sum, I find and conclude that none of the foregoing factors create an inference or establish that Complainant's protected activity was a contributing factor in his termination by Respondent.

F. Respondent's Clear and Convincing Evidence

Assuming arguendo that Complainant's protected activity was a contributing factor to his discharge, I find Respondent has established clear and convincing evidence of a legitimate, non-discriminatory business reason for its decision and that it would have taken the same unfavorable action in the absence of his protected activity. I find and conclude Respondent credibly established that Complainant's complaints and expressed safety concerns played no role in its decision to terminate him.

In brief, Complainant persists in arguing that Respondent offered no evidence that the tail stand incident warranted the termination of Complainant. He argues that Respondent's "dilatory investigation of the Flight Engineer's culpability, and the meager discipline awarded the Flight Engineer and First Officer speaks volumes about the relative seriousness of the matter." Complainant argued that Respondent "was unable to present any evidence that in the airline industry such a minor unusual occurrence was worthy of termination." (Emphasis supplied). I find and conclude that Complainant was discharged for his inadequate and untimely reporting of the tail stand incident and his prior counseling regarding communication and ineffectual CRM, not the occurrence of the tail stand incident itself.

Complainant has presented no evidence that Respondent's proffered reasons for his discharge are false or constituted a pretext for discrimination. The catalogue of pretext factors discussed above were unpersuasive for the reasons there explicated. The fact that Complainant disagrees with Respondent's proffered reasons or believes them to be unjustified does not, without more, establish intentional discrimination under AIR21. Complainant did not otherwise challenge the proffered reasons, the expectations of Captain Spence with regards to reports of unusual occurrences or Complainant's past counseling sessions and the reasons therefor.

G. Conclusions

Accordingly, the weight of the credible evidence indicates that Complainant has failed to demonstrate that his protected activity was a contributing factor in Respondent's decision to terminate his employment. Therefore, I find and conclude that Complainant has not established a **prima facie** case of discrimination since Respondent has shown clear and convincing evidence that Complainant has a history of communication problems and confrontations with others, as were fully discussed above, and therefore, his termination was the result thereof and not his protected activity.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Complainant has not established all the necessary elements of a **prima facie** case of retaliation by Respondent and his complaint is hereby **DISMISSED**.

ORDERED this 15th day of February 2002, at Metairie, Louisiana.

A
LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: Review of the Recommended Decision and Order issued in the above captioned matter is by the Administrative Review Board pursuant to § 4.c.(39) of the Secretary's Order 2-96, 61 Fed. Reg. 19978(1996). That Order provides that the Administrative Review Board is delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of certain enumerated decisions and recommended decisions by Administrative Law Judges. This delegation includes any laws subsequently enacted, such as AIR21, which by statute provide for final decisions by the Secretary of Labor upon review of decisions or recommended decisions issued by ALJs. *See* 49 U.S.C.A. § 42121(b)(3)(A). Regulations have not yet been promulgated by the Department of Labor for the handling of review by the Administrative Review Board of decisions by ALJs under the employee protection provisions of AIR21. Accordingly, this Recommended

Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210. *See* 5 U.S.C. § 557(b). However, in light of the absence of regulations promulgated under AIR 21, the parties are advised to consider preserving their rights of appeal by also directly filing with the Administrative Review Board a protective appeal of any adverse finding and conclusion.